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In the

Supreme Court of the United States

October Term, 196[illegible]

MILK TRANSPORT, INC.,

Appellant,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Appellees,

and

ALTERMAN TRANSPORT LINES, INC., and REFRIGERATED TRANSPORT CO., INC.,

Intervenors.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA, THIRD DIVISION

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

OPINION AND JUDGMENT BELOW

The opinion of the three-judge District Court, filed December 21, 1960, is reported in 190 F. Supp. 350. The opinion is included here as Appendix A.

The decision of the Interstate Commerce Commission, here involved, has not been printed in the official reports, but appears here as Appendix B.

GROUNDS OF JURISDICTION

This suit was brought by Appellant, Milk Transport, Inc., to set aside the Order of September 4, 1959, of the Appellee, Interstate Commerce Commission, in No. MC 113255 (Sub No. 8) and No. MC 113255 (Sub No. 9), *Milk Transport, Inc., "Grandfather Application" and Milk Transport, Inc., "Interim Application."* The action was commenced before a three-judge court in the District of Minnesota pursuant to Sec. 205(g) of the Interstate Commerce Act, 49 *U.S.C.A.*, Sec. 305(g), Sec. 10 of the Administrative Procedure Act, 5 *U.S.C.A.*, Sec. 1009, and §§ 1336, 1398, 2284 and 2321-2325, inclusive, of the Judicial Code, 28 *U.S.C.A.*, §§ 1336, 1398, 2284 and 2321-2325. Milk Transport, Inc., in addition, sought a mandatory injunction requiring the Interstate Commerce Commission to hear and determine Milk Transport's applications for a certificate to transport citrus juices, in bulk, in tank vehicles, under the provisions of §7(c) of the Transportation Act of 1958, 72 Stat. 573 (Appendix E). The Commission had, by its Order of September 4, 1959, dismissed Milk Transport's applications without a hearing.

The judgment appealed is dated December 19, 1960, and was entered December 21, 1960. The notice of appeal was filed February 17, 1961, in the United States District Court, District of Minnesota. The time for docketing this case in the Supreme Court was subsequently extended to May 18, 1961, by Order of the District Court dated April 6, 1961.

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by §§ 1253 and 2101(b) of the Judicial Code, 28 *U.S.C.A.*, §§ 1253 and 2101(b).

A number of cases sustain the jurisdiction of the Supreme Court, among them, *Schaffer Transportation Company v. U. S.*, 355 U.S. 83, 78 S.Ct. 173, 2 L.Ed.2d 117; *United States, et al., v. Pierce Auto Freight Lines, Inc., et al.*, 327 U.S. 515, 66 S.Ct. at 687, 90 L.Ed. 821.

QUESTIONS PRESENTED BY APPEAL

(1) Are the "grandfather" and "interim" provisions of §7(c) of the Transportation Act of 1958 applicable only to applications for certificates to transport the 11 specified commodities in the second proviso of §7(a) of the Transportation Act of 1958, as was decided by the lower court, or, are said "grandfather" and "interim" provisions applicable to applications for certificates to transport *all* commodities "made subject to" Part II of the Interstate Commerce Act by *both* the first and second provisos of §7(a) of the Act of 1958, including citrus juices?

(2) Was the transportation of citrus juices "exempt" under §203(b)(6), Part II, Interstate Commerce Act, prior to its amendment by §7(a) of the Transportation Act of 1958?

The Interstate Commerce Commission held in the negative on question (2) and dismissed appellant's applications for that reason. The three-judge court held question (2) to be immaterial.

STATEMENT OF THE CASE

This proceeding affords the first opportunity for this Court to interpret the provisions of §7(c) of the Transportation Act of 1958 (not codified in the United States Code). In addition, the resolution of the issues presented herein involves the interpretation of §203(b)(6) of Part II of the Interstate Commerce Act (49 *U.S.C.* §303(b)(6)), both before and after its amendment by §7(a) of the Transportation Act of 1958.

On December 10, 1958, Milk Transport, Inc., the appellant, filed with the Interstate Commerce Commission two applications for a certificate to transport citrus juices, in bulk, in tank vehicles, from points in Florida and Texas to

points in Minnesota, Wisconsin, Illinois, North and South Dakota and Iowa. The applications were filed specifically for determination and handling under the "grandfather" and "interim" clauses of §7(c) of the Transportation Act of 1958, and were filed within the 120-day period prescribed by the Act of 1958.[1]

The "grandfather" provision of §7(c) reads as follows:

> "* * * if any person * * * was in bona fide operation on May 1, 1958, * * * in the transportation of property for compensation by motor vehicle made subject to the provisions of Part II of that Act by paragraph (a) of this section * * * the Interstate Commerce Commission shall without further proceedings issue a certificate or permit * * *."

The phrase "Part II of that Act" refers to Part II of the Interstate Commerce Act, (49 *U.S.C.A.*, §§ 301-328). The phrase, "paragraph (a) of this section" refers to §7(a) of the Transportation Act of 1958, which amended §203(b)(6) of Part II of the Interstate Commerce Act, the agricultural commodity exemption clause of the Federal Motor Carrier Act.

Sec. 203(b)(6) of Part II exempts carriers engaged in the transportation of non-manufactured agricultural commodities from the necessity of obtaining Certificates of Public Convenience and Necessity authorizing such transportation pursuant to §206 of Part II of the Interstate Commerce Act. Sec. 7(a) of the Act of 1958 extensively amended §203(b)(6), (see Appendix D) and as a result of §7(a), many commodities which were formerly "exempt" under §203(b)(6), as interpreted by this Court, became suddenly "not exempt," meaning that a certificate had to be obtained in order

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[1]There is a distinction between the "interim" and "grandfather" clauses of §7(c), but this difference is not material at this point. To simplify the presentation of the issues, it will be necessary only to discuss the "grandfather" provision of §7(c).

that a carrier might continue transporting these commodities. Congress provided a "grandfather" clause in §7(c) of the Act of 1958 in order that existing carriers, caught in the change of law, would be automatically certificated without the necessity of applying under §206 for a certificate of Public Convenience and Necessity. The existing carriers were required only to file their "grandfather" applications within 120 days after the effective date of the Act of 1958, or by December 12, 1958.[2]

The three-judge court stated at 190 F.Supp. at 352:

> "All parties agree that a basic requirement of the right to continue hauling a particular commodity under the 'grandfather' clause is that the commodity must have been 'exempt' prior to the 1958 Act and was made 'non-exempt' by the Act."

To state it in another fashion, the phrase in §7(c):

> "made subject to * * * Part II of that Act by paragraph (a) of this section,"

should be read:

> "changed from 'exempt' to 'not exempt' by §7(a) of the Act of 1958."

It was, and is, the contention of appellant, Milk Transport, that, under the law as interpreted by this Court prior to the Act of 1958, citrus juices were an agricultural commodity and not a manufactured product thereof within the meaning of former §203(b)(6) of Part II of the Interstate Commerce Act, or were, in other words, "exempt" from the certificate requirements of §206 of Part II of the Interstate Commerce Act. This contention is based primarily upon *East Texas Motor Freight Lines v. Frozen Foods Express*, 1956, 351 U.S. 49, 76 S.Ct. 574, 100 L.Ed. 917.

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[2]In all respects the procedural requirements were complied with by Milk Transport, Inc.

It is conceded, of course, that citrus juices are now "not exempt," by virtue of the first proviso of §7(a) of the Act of 1958. The first proviso incorporated, by reference, Ruling 107, March 19, 1958, Bureau of Motor carriers, Interstate Commerce Commission, and declared that all commodities in Ruling 107 listed as "not exempt" therein, shall be "not exempt" and similarly commodities listed as "exempt" in Ruling 107 shall be "exempt." Citrus juices are now "not exempt" by statute because they are listed as "not exempt" on page 6 of Ruling 107.

Therefore, appellant contended, and contends now, that citrus juices being "exempt" prior to the Act of 1958 and "not exempt" after the Act of 1958, the legal prerequisites are present for the applicability of the "grandfather" clause of §7(c), and the Commission was therefore required to accept the applications for determination and handling under §7(c).

The Commission, by order of September 4, 1959, dismissed plaintiff's applications without a hearing. See Appendix B. Milk Transport's Petition for Reconsideration was denied by the Commission on December 22, 1959. Appendix C.

The Commission's Order is succinct. The Commission determined simply that citrus juices were not "exempt" prior to the Act of 1958 under former §203(b)(6), and that there had not been, therefore, the requisite change of status from "exempt" to "not exempt" for the "grandfather" clause of §7(c) to apply.

At this point, then, the only issue was whether the Commission's decision was correct for the reason given.

The plaintiff, on April 8, 1960, commenced proceedings before the three-judge Court in the District of Minnesota for review of the Commission's Order of September 4, 1959.

The United States and the Interstate Commerce Commission did not defend the Order of the Commission upon the grounds invoked in the Order. The claim was made that the

issue of the "exempt" status of citrus juice prior to the Act of 1958 was immaterial.

Instead, the appellees contended, and the lower Court agreed, that, even though citrus juices may have been "exempt" prior to the Act of 1958, Milk Transport was, nevertheless, not entitled to secure a certificate under the lenient "grandfather" clause of §7(c).

The appellees and the lower court reasoned that the lenient provisions of the "grandfather" clause of §7(c) were applicable only to the 11 specified commodities in the *second* proviso of §7(a) of the Act of 1958[3], and since citrus juices were not one of those commodities, it made no difference that citrus juices may have been "made subject to" Part II of the Interstate Commerce Act by the *first* proviso of §7(a) of the Act of 1958.

The reason assigned by the Commission for dismissing appellant's applications and the reason given by the three-judge Court for sustaining the Order of the Commission are quite different. The failure of the appellees to defend the reason given by the Commission is a tacit admission of error by the Commission.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

I.

The first question deals with the correctness of the decision of the three-judge Court that the "grandfather" rights of §7(c) are applicable only to the 11 commodities listed in the second proviso of §7(a). This is the first case in which this question has been presented to this Court. The question is a matter which has major significance in the administration of the Interstate Commerce Act.

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[3]"Frozen fruits, frozen berries, frozen vegetables, cocoa beans, coffee beans, tea, bananas, or hemp, and wool imported from any foreign country, wool tops and noils, or wool waste (carded, spun, woven, or knitted)."

The holding of the three-judge Court is submitted to be erroneous for the following reasons:

(1) The "grandfather" rights secured in §7(c) are expressly applicable to property "made subject to the provisions of Part II of that Act *by paragraph (a) of this section* [§7(a)]." (Emphasis added.) The lower Court did *not* decide that only the 11 specified commodities were "made subject to" Part II, but determined that *regardless* of what other commodities may have been "made subject to" Part II by §7(a), only carriers of the 11 specified commodities would be afforded "grandfather" rights. These 11 commodities are listed in the *second proviso* of §7(a). Citrus juices were "made subject to" Part II by the *first proviso*, §7(a), through the statutory incorporation of Ruling 107. Sec. 7(c) makes no distinction between the first and second provisos of §7(a) but simply states "paragraph (a)," which means, obviously, the whole of §7(a). A carrier of any commodity whose status was changed from "exempt" to "not exempt" by either the first or second provisos of §7(a) is entitled to "grandfather" rights under §7(c).

(2) The express language of §7(c) denies any restrictive interpretation limiting its effect to only the second proviso commodities of §7(a). Therefore, the lower court's inquiry into the legislative history is unwarranted. §7(c) is unambiguous.

(3) Even so, the legislative history, read as a whole, indicates only that Congress intended in §7(a) to make specific, by statute, the status of hundreds of commodities in order to prevent the administration of Part II of the Interstate Commerce Act from becoming convulsed in interminable litigation.[4] To be sure, the 11 commodities listed in the second proviso of §7(a) were accorded

"grandfather" rights, but the Committee reports do not state or even imply, that *only* carriers of these 11 commodities were to be so favored. The decision of the lower court means that coffee bean carriers, for instance, survived unaffected by the imposition of the full weight of regulation, while formerly exempted citrus juice carriers were threatened with extinction with the change of law by the long interruption in operations until they could obtain a certificate of public convenience and necessity under §206 of Part II. Carriers with "grandfather" rights were allowed to continue operations during the pendency of their "grandfather" applications by the terms of §7(c) of the Act of 1958. Such an intention to discriminate, without a reasonable basis, between carriers of coffee beans and citrus juices, cannot be attributed to Congress.

(4) The lower court has judicially amended §7(c) to read:

> "made subject to * * * Part II * * * by *the second proviso* of paragraph (a) of this section."

If Congress intended that only existing carriers of the 11 commodities listed in the second proviso of §7(a) were to have "grandfather" rights under §7(c), Congress could easily have said so by the addition of only a few words, but it did not.

(5) The fact that the Commission refused to dismiss the application for the reasons stated by the Court, constitutes the strongest possible administrative interpretation of §7(c), which is contrary to the interpretation given by the three-judge court.

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[4]Due, in large part, to the Commission's reluctance to accept this Court's decision in *East Texas Motor Freight Line v. Frozen Foods Express*, supra. The Commission has officially expressed its extreme distaste for the *East Texas* case. See *Determination of Exempted Agricultural Commodities (coffee and cucumbers)*, 74 M.C.C. 549.

(6) The Commission has itself interpreted §7(c) in a manner contrary to the lower court's interpretation. *Inland Motor Freight Grandfather Application* (Oct. 7, 1960), 14 Fed. Carr. Cas., par. 35,004 (CCH reports); see *ICC Practitioner's Journal*, February, 1961, page 602. The Commission stated therein that §7(c) was intended "to secure to existing carriers their right to operating authority coextensive with their prior lawful operations."

II.

If question (1) is determined favorably to the appellant, Milk Transport, there nevertheless remains the question of whether the status of citrus juices was changed from "exempt" to "non-exempt" by §7(a) of the Act of 1958. This question, in turn, narrows to the issue of whether citrus juices were "exempt" prior to the Act of 1958, (since they are concededly "not exempt" since the Act of 1958). The question must be decided in the light of former §203(b)(6), as interpreted by this Court prior to the Act of 1958.

Former §203(b)(6) provided simply, in pertinent part:

"§203.

"(b) Nothing in this part, except the provisions of §204 relative to qualifications in maximum hours of service of employees and safety of operation or standards of equipment shall be construed to include * * *

"(6) Motor vehicles used in carrying property consisting of * * * agricultural (including horticultural) commodities (not including manufactured products thereof) * * *."

We submit it is self-evident that citrus juices are a basic agricultural commodity and are not a manufactured product. The controlling interpretation of former §203(b)(6) is *East Texas Motor Freight Line v. Frozen Foods Express*, 351 U.S. 49, 76 S.Ct. 574, 100 L.Ed. 917, wherein the principle was announced:

> "At some point processing and manufacturing will merge. But where the commodity retains a continuing substantial identity through the processing state, we cannot say that it has been "manufactured" within the meaning of §203(b)(6)."

It is obvious that citrus juices not only maintain their substantial identity during extraction process, but remain precisely identical with the juice as it is first created by nature within the host fruit. Extraction amounts to no more than merely removing the juice from its natural environment.

By consent of the parties there was submitted to the three-judge court a partial transcript in a proceeding before the Commission entitled *Milk Transport, Inc.—Extension—Citrus Juices, Frostproof, Fla.*, MC 113255 (Sub 15). This transcript is contained in Appendix III of Milk Transport's brief to the three-judge Court dated July 1, 1960. This testimony establishes that juices (in this case, orange juice) are extracted by machine, flash-pasteurized and pre-cooled, prior to transporting in truck-trailers. Nothing more occurs. In another proceeding, *Milk Transport, Inc.—Extension—Bulk Commodities*, MC 113255 (Sub No. 3), reported in 78 M.C.C. 335, the process is described by the Commission as follows:

> "The juice is prepared for shipment at Frostproof (Fla.) by a flash-heating process to pasteurize it and inhibit the growth of bacteria, after which it is chilled and shipped in insulated, stainless steel tank vehicles."

This slight processing is, perhaps, less intense than the very similar treatment given milk, yet milk has consistently been held to be a non-manufactured agricultural commodity by the Commission. *Determination of Exempted Agricultural Commodities*, 52 M.C.C. 511, 551.

In *East Texas Motor Freight Line v. Frozen Foods Express*, supra, the Court discussed the considerable processing which takes place when a chicken is killed and dressed for market; the Court stated:

> "But it is no more drastic a change than a change which takes place in milk from pasteurizing, homogenizing, adding vitamin concentrates, standardizing, and bottling. Yet the Commission agrees that milk so processed is not a 'manufactured' product, but falls under the meaning of the 'agricultural' exemption. 52 M.C.C. 511, 531."

A number of decisions have dealt with the "exempt" or "non-exempt" status, under former §203(b)(6), of commodities which, like orange juice, are created by nature within a protective covering, shell, or husk.

In *Erickson Transport Corp. Extension—Madison, So. Dak.*, 78 M.C.C. 707 (1957), the Commission itself held that fresh liquid eggs, egg yolks, and egg albumin, removed from the shell, were non-manufactured and "exempt" under former §203(b)(6).

In *Frozen Foods Express v. U. S.*, 148 F. Supp. 399, affirmed 355 U.S. 6, the Court held that dried egg powder, dried egg yolks, and ground shell peanuts, among other commodities, were "exempt" and not manufactured commodities, yet each of these commodities was first removed from an outer protective shell and then subjected to far more severe processing than in the case of citrus juices.

The Commission, in the present case, held that citrus juices were "non-exempt" prior to the Act of 1958, and based its decision upon its prior decision in *Watkins Motor Lines, Inc.—Interpretation*, 64 M.C.C. 455 (1955), in which it held citrus juices to be manufactured commodities. At 64 M.C.C. at 459, the Commission stated:

> "That the extracting of juice from an orange creates a new form cannot be gainsaid. Instead of a fruit, we have a potable liquid. The orange enters the extractor as an agricultural commodity and emerging therefrom are skins, seeds, pulp, and, in our opinion, a manufactured product of the orange, namely, orange juice."

The *Watkins* decision is premised, falsely, upon the idea that extraction is a creative process. The Commission's own *Erickson* decision, supra, and *Frozen Foods Express v. U. S.*, supra, sufficiently demonstrate the error of this reasoning. The *Watkins* case cannot be reconciled with *East Texas Motor Freight Lines v. Frozen Foods Express*, supra.

It is, therefore, apparent that citrus juices were "exempt" under former §203(b)(6) as interpreted by this Court prior to the Act of 1958.

It should be noted that §7(a) of the Act of 1958 cannot have the retroactive effect of making citrus juices "not exempt" prior to its enactment. In deciding this particular question the Supreme Court must interpret the law as it was *before* the enactment of §7(a).

The Court will note that this case involves a complicated interplay of several controversial statutes, each with a considerable legislative history. This jurisdictional statement, however, does not permit a complete analysis and argument. This case is of considerable importance both to the appellant and to the Commission since it will determine whether the Commission has been properly administering the "grandfather" clause of §7(c) of the Act of 1958. It is submitted that both the Commission and the lower court have erroneously interpreted the Federal statutes here involved and, that, for the reasons given, the questions involved are substantial and of public importance. Probable jurisdiction should be noted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Perry R. Moore, one of the attorneys for appellants herein, and a member of the bar of the Supreme Court of the United States, hereby certify that, on the 16 day of May, 1961, I served copies of the foregoing document on the several parties hereto, as follows:

1. On the United States, by mailing copies thereof in duly addressed envelopes, with mailing postage prepaid, to the Solicitor General, Department of Justice, Washington 25, D. C., Robert A. Bicks, Assistant Attorney General, Department of Justice, Washington 25, D.C., and John H. D. Wigger, attorney, Department of Justice, Washington 25, D.C., and by mailing a copy thereof in a duly addressed envelope postage prepaid to Miles Lord, United States Attorney, Federal Courts Building, St. Paul, Minnesota.
2. On the Interstate Commerce Commission, by mailing copies thereof, in duly addressed envelopes, with airmail postage prepaid, to Robert W. Ginnane, General Counsel, and Fritz R. Kahn, attorney, Interstate Commerce Commission, Washington 25, D.C.
3. On the intervenors, by mailing a copy thereof, in a duly addressed envelope, with airmail postage prepaid, to Frank B. Hand, Esq., and Daniel B. Johnson, Esq., Transportation Building, Washington 6, D.C.

/s/ Perry R. Moore

APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

3-60-Civ-82

MILK TRANSPORT, INC.,

Plaintiff,

vs.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA,

Defendants,

and

ALTERMAN TRANSPORT LINES, INC., and
REFRIGERATED TRANSPORT CO., INC.,

Intervening Defendants.

MEMORANDUM & ORDER

Mr. Clay R. Moore and Mr. Donald A. Morken, Minneapolis, Minnesota, attorneys for plaintiff.

Mr. Robert W. Ginnane, General Counsel, and Mr. Fritz R. Kahn, attorney, Washington, D. C., attorneys for Interstate Commerce Commission.

Mr. Robert A. Bicks, Assistant Attorney General, Mr. John H. D. Wigger, Attorney, Washington, D. C., and Mr. Fallon Kelly, United States Attorney, St. Paul, Minnesota, attorneys for United States of America.

Mr. Frank B. Hand, Jr., and Mr. Daniel B. Johnson, Washington, D. C., attorneys for intervening defendants.

Before Sanborn, Circuit Judge, Nordbye and Devitt, District Judges.

This is an appeal from an order of the Interstate Commerce Commission dismissing plaintiff's applications for certificates to transport citrus juices, in bulk, in tank vehicles, under the "grandfather" and "interim" clauses of the Transportation Act of 1958. Plaintiff asks this statutory three-Judge Court, 28 U.S.C. 2325, to set aside the order and enjoin the Commission by mandatory injunction to hear and determine plaintiff's applications.

This controversy stems from plaintiff's submission of Section 7(c), 72 Stat. 573, "grandfather" and "interim" applications to the Interstate Commerce Commission seeking authority to transport citrus juices in tank vehicles from points in Florida and Texas to points in several northern states. The applications were dismissed by an order dated September 4, 1959, without a hearing. Plaintiff's petition for reconsideration was denied by the Commission on December 22, 1959.

The broad issue is whether an interstate commerce motor carrier in bona fide transportation of citrus juices prior to the 1958 Transportation Act has an absolute right, under the "grandfather" clause of that Act, to continue transporting citrus juices without obtaining a Certificate of Public Convenience and Necessity from the Commission.

A short explanation of the issue in the light of the undisputed facts may be helpful.

The Interstate Commerce Act provides in Part II, 49 U.S.C. 301-328, for comprehensive regulation of motor carriers operating in interstate commerce. Basic to the Act is the prohibition contained in Sections 206 and 207 (49 U.S.C. 306, 307), against motor carriers operating in interstate commerce without holding a Certificate of Public Convenience and Necessity. This certificate requirement is waived in the situations set forth in Section 203(b), (49 U.S.C. 303(b)). The exemption involved in this controversy relates to agricultural commodities and as pertinent reads as follows:

> "Sec. 203
>
> "(b) Nothing in this part, except the provisions of Section 204 relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment shall be construed to include
>
> • • •

"(6) Motor vehicles used in carrying property consisting of * * * agricultural (including horticultural) commodities (not including manufactured products thereof), * * *"

Much litigation developed over the years as to whether certain products were agricultural commodities and hence "exempt" from the certificate requirement or were "manufactured products thereof" and thus "non exempt" from the requirement. The principal question involved the determination of how much processing could be done to an agricultural commodity before it changed to a "manufactured product thereof."

Section 7(a) of the 1958 Transportation Act amended Section 203(b)(6), (49 U.S.C. 303(b)(6)), and made more specific the provisions concerning the "exempt" or "non exempt" status of many commodities. The pertinent parts of the amended section are contained in the footnote.[1] Citrus juices are listed as "non exempt" in Commission Ruling 107 incorporated in the amended section. They have therefore been "non exempt" commodities since the 1958 Act became law. Consequently, a motor carrier operator who now desires to transport citrus juices in interstate commerce is required to have a Certificate of Public Convenience and Necessity from the Commission unless the carrier can prove that it was in bona fide transportation of citrus juices prior to the

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[1] "(b) Nothing in this part, except the provisions of Section 204 relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment shall be construed to include * * *

"(6) motor vehicles used in carrying property consisting of ordinary livestock, * * *, or agricultural (including horticultural) commodities (not including manufactured products thereof), * * *

"*Provided*, That the words 'property consisting of ordinary livestock, * * *, or agricultural (including horticultural) commodities (not including manufactured products thereof)' as used herein shall include property shown as 'Exempt' in the 'Commodity List' incorporated in ruling numbered 107, March 19, 1958, Bureau of Motor Carriers, Interstate Commerce Commission, but shall not include property shown therein as 'Not Exempt'; *Provided further, however*, That notwithstanding the preceding proviso the words 'property consisting of ordinary livestock, * * * or agricultural (including horticultural) commodities (not including manufactured products thereof)' shall not be deemed to include frozen fruits, frozen berries, frozen vegetables, cocoa beans, coffee beans, tea, bananas, or hemp, and wool imported from any foreign country, wool-tops and noils, or wool waste (carded, spun, woven, or knitted. * * *"

1958 Act and that it has a right to continue transporting citrus juices by virtue of the "grandfather" clause enacted in Section 7(c) of the 1958 Transportation Act. The pertinent provisions of that section read as follows:

> "* * * if any person * * * was in bona fide operation on May 1, 1958, * * * in the transportation of property for compensation by motor vehicle *made subject to* the provisions of Part II of that Act by paragraph (a) of this section, * * * the Interstate Commerce Commission shall without further proceedings issue a certificate or permit. * * *" [Emphasis supplied.]

It is undisputed that plaintiff was a bona fide transporter of citrus juices prior to 1958. All parties agree that a basic requirement of the right to continue hauling a particular commodity under the "grandfather" clause is that the commodity must have been "exempt" prior to the 1958 Act and was made "non exempt" by the Act.

Plaintiff contends since there's no dispute that it was a bona fide hauler of citrus juices prior to 1958, the only issue for this court is whether citrus juices were "exempt" commodities prior to the 1958 Transportation Act amendment of Section 203(b)(6). If citrus juices were exempt, plaintiff claims the Commission must under the "grandfather" clause issue plaintiff a certificate without proof of public convenience and necessity. Plaintiff argues that even though the Commission had held citrus juices to be "non exempt" prior to 1958 in *Watkins Motor Lines, Inc., Interpretation*, 64 M.C.C. 455 (Div. 1, 1955), later U. S. Supreme Court and Federal District Court cases, see *East Texas Motor Freight Lines v. Frozen Food Express*, 351 U.S. 49 (1956), *Frozen Foods Express v. United States*, 148 F. Supp. 399, aff. 355 U.S. 6 (1957), *I.C.C. v. Koblin*, 113 F. Supp. 599 (1953), make it clear that citrus juices would have been declared "exempt" had an appropriate controversy reached the courts.

The defendants contend the issue of whether citrus juices were "exempt" prior to 1958 is not relevant to this proceeding. They argue that "grandfather" rights were conferred only on the eleven commodities[2] specifically listed in Section

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[2]"Frozen fruits, frozen berries, frozen vegetables, cocoa beans, coffee beans, tea, bananas, or hemp, and wool imported from any foreign country, wool tops and noils, or wool waste (carded, spun, woven, or knitted)."

7(a) as now being "non exempt." Defendants argue that the wording of Section 7(c) plus the Congressional intent as evidenced by committee reports indicates that only the eleven commodities listed were "made subject to" the certificate requirement of Part II of the Act, and consequently "grandfather" rights were given only to carriers of those specific commodities. Since citrus juices were not included in the commodities specifically listed in Section 7(a), they submit the question of whether citrus juices were "exempt" prior to 1958 is irrelevant.

We agree with the defendants that the first issue to be met is whether citrus juices were covered by the "grandfather" clause. If citrus juices were not included, we need not determine whether they were "exempt" prior to 1958.

It is axiomatic that Congress could include or exclude any commodities from the benefit of the "grandfather" clause. Congress could have refused to include any "grandfather" benefits in the 1958 Act. Consequently, assuming that a particular commodity had been specifically held "exempt" prior to 1958 and then declared "non exempt" by the 1958 Act, Congress could have excluded this particular commodity from "grandfather" rights while giving the benefit to other commodities. We must therefore look to the statute to determine whether citrus juices were accorded "grandfather" rights.

The essential provisions of Sections 7(c) and 7(a) have been previously quoted in this memorandum. The primary question in resolving this dispute is the determination of what the words "made subject to" mean in the context of the statute. Plaintiff contends the phrase means that all commodities in Section 7(a), including those in Ruling 107 in the first proviso are subjected to the requirements of Part II of the Act. Defendants argue that the only items "made subject to" Part II are the eleven specified commodities in the second proviso. No determination as to the status of several of these commodities had ever been made, but Ruling 107 listed most of the eleven items as having been found "exempt" by the courts or the Commission, and defendants contend that these items were being brought back under regulation by Section 7(a). They argue that Congress gave

"grandfather" rights only to carriers which had been legitimately hauling these eleven commodities.

We agree with the defendants' interpretation of Section 7(c). Congress did not have to make the items in Ruling 107 subject to the Act, with the exception of the eleven commodities which had either been declared "exempt" or on which no ruling had been made. It is perhaps true, as plaintiff argues, that Congress would have specifically afforded "grandfather" rights to citrus juices had they been declared "exempt" in any appropriate controversy which reached the courts. Remembering, however, that Congress could limit "grandfather" benefits as it chose, it matters only that Congress gave its approval to the Commission's characterization of citrus juices as "non exempt" commodities. Citrus juices had been held "non exempt" prior to 1958 by the Commission, *Watkins Motor Lines, Inc., Interpretation*, 64 M.C.C. 455 (Div. 1, 1955), and Congress was providing "grandfather" rights only for carriers of those eleven commodities which had been "exempt" and were being specifically made "non exempt."

Where the terms of a statute are not clear, we may look to the legislative history in an attempt to determine the intent of Congress. *United States v. UAW-CIO*, 352 U.S. 567 (1957); *Woods v. Western Holding Corp.*, 173 F.2d 655, 659 (8th Cir. 1949). The committee reports clearly indicate Congressional intent in the enactment of the "grandfather" clause. The report of the House Committee on Interstate and Foreign Commerce, H.R. Rep. No. 1922, 85th Cong. 2d Sess. 17 (1958), reads in part as follows:

> "This amendment would halt further expansion of the scope of the exemption, and it would return to economic regulation the transportation of frozen fruits, frozen berries, frozen vegetables, coffee, tea, cocoa, hemp, imported wool and certain categories of domestic wool. • • •
>
> "Any person engaged on June 1, 1958, in trucking *the aforementioned commodities* which are returned to regulation by this amendment would be entitled upon application to a certificate or permit • • •." [Emphasis supplied.]

The conference report, H.R. Rep. No. 2274, 85th Cong., 2d Sess. 15 (1958), indicates further Congressional intent to

provide "grandfather" benefits only for the mentioned commodities as follows:

> "Under the conference agreement the agricultural commodities exemption is frozen in accordance with ruling 107, referred to above, with the following modification, which is a compromise between the Senate and House provisions: Returned to economic regulation is the transportation by motor vehicle of frozen fruits, frozen berries, frozen vegetables, cocoa beans, coffee beans, tea, bananas, hemp, wool imported from any foreign country, wool tops and noils and wool waste which has been carded, spun, woven, or knitted. * * *
>
> "Under the House amendment any person engaged on June 1, 1958, in trucking the *aforementioned commodities* which are returned to economic regulation by this amendment would be entitled, upon application to a certificate or permit allowing him, under regulation, to continue the transportation of the same commodities within the same areas or between the same points. The Senate bill used the date January 1, 1958. The conference agreement uses the date May 1, 1958." [Emphasis supplied.]

It is clear from this language that Congress intended only the eleven specified commodities, and not including citrus juices, to have "grandfather" benefits.

Plaintiff also argues that the Commission itself, *Inland Motor Freight "Grandfather" Application;* No. MC59077 (Sub. No. 33), 14 Fed. Carr. Cas., Para. 35,004 (C.C.H.) (Div. 1, Oct. 1960), determined that the words "made subject to" should not be read in a restrictive sense. That decision relates solely to the situation where an otherwise "exempt" commodity loses its exemption when hauled with a "non exempt" commodity in the same vehicle at the same time. The *Inland* case is not applicable to this controversy.

Plaintiff lastly contends that the scope of review is limited to a consideration of the grounds set forth in the Commission's order for its decision. Plaintiff argues that the Com-

mission order of September 4, 1959,[3] dismissed plaintiff's applications solely for the reason that citrus juices were not "exempt" commodities prior to the 1958 Transportation Act. Consequently, plaintiff submits that, under the holding in the *Chenery* cases, *S.E.C. v. Chenery Corp.*, 318 U.S. 80 (1943), and *S.E.C. v. Chenery Corp.*, 332 U.S. 194 (1947), this court cannot uphold the Commission on grounds other than those specified in the order

In the first *Chenery* case, 318 U.S. 80 (1943), the Supreme Court reviewed an order of the Securities and Exchange Commission which refused to allow preferred stock acquired by management officials during a reorganization period to participate in the reorganization on an equal footing with all other preferred stock. The corporation involved was registered under the public Utility Holding Company Act and the Commission had to determine whether the terms of the new stock issuance were "fair and equitable" or "detrimental to the interest of investors" within the meaning of the Act. The Commission based its order on principles of equity as announced by the courts, but the Supreme Court held that the authorities cited were not sufficient to sustain the order and the case was remanded to the Commission.

The first *Chenery* case did hold that a reviewing court must judge an agency order only on the grounds on which the order was based, but the court limited this rule to determinations which the administrative agency alone is authorized to make. The court, 318 U.S. 80, 88, used these words:

> "In confining our review to a judgment upon the validity of the grounds upon which the Commission itself based its action, we do not disturb the settled rule that,

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[3] "• • • It further appearing, That in Watkins Motor Lines, Inc., Interpretation of Certificates, 64 M.C.C. 455, it was found that the term 'agricultural commodities (not including manufactured products thereof)' as used in Section 203(b)(6) of the Interstate Commerce Act does not include citrus juices;

And it further appearing, That as citrus juices, in bulk, in tank vehicles, was not included in the term 'agricultural (including horticultural) commodities (not including manufactured products thereof),' as used in Section 203 (b)(6) of the Interstate Commerce Act prior to the Transportation Act of 1958;

It is ordered, That the applications • • • be, and they are hereby, dismissed • • •"

in reviewing the decision of a lower court, it must be affirmed if the result is correct 'although the lower court relied upon a wrong ground or gave a wrong reason.' Helvering v. Gowan, 302 U.S. 238, 245. The reason for this rule is obvious. It would be wasteful to send a case back to a lower court to reinstate a decision which it had already made but which the appellate court concluded should properly be based on another ground within the power of the appellate court to formulate. But it is also familiar appellate procedure that where the correctness of the lower court's decision depends upon a determination of fact which only a jury could make but which has not been made, the appellate court cannot take the place of the jury. Like considerations govern review of administrative orders. If an order is valid only as a determination of policy or judgment which the agency alone is authorized to make and which it has not made, a judicial judgment cannot be made to do service for an administrative judgment. For purposes of affirming no less than reversing its orders, an appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative Agency."

We are not concerned here with a judgment which only the Interstate Commerce Commission can make. The expertness of the Commission does not make it better qualified than this court to interpret the phrase "made subject to" involved in this action. The interpretation here is wholly different from what it is in the case where Congress specifically entrusts an administrative agency, because of its special competence, with the task of defining or interpreting general words[4] or setting up standards or rules of conduct. We are interpreting the scope of a federal statute and this task is not peculiar to an administrative agency.

Having decided that the transportation of citrus juices was not afforded "grandfather" rights under Section 7(c) of the 1958 Transportation Act, we need not determine whether

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[4]Such as the words involved in the *Chenery* case—"fair and equitable" or "detrimental to the interests of investors."

citrus juices were "exempt" commodities prior to 1958.

Plaintiff's complaint is dismissed.

Dated: December ..., 1960.

/s/ John B. Sanborn,
Circuit Judge

/s/ Gunnar H. Nordbye,
District Judge

/s/ Edward J. Devitt,
District Judge

APPENDIX B

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, held at its office in Washington, D. C., on the 4th day of September, A.D. 1959.

NO. MC-113255 (Sub-No. 8)

MILK TRANSPORT, INC.
"GRANDFATHER" APPLICATION

(NO. MC-113255 (Sub-No. 9)

MILK TRANSPORT, INC.
"INTERIM" APPLICATION

It appearing, That in No. MC-113255 (Sub-No. 8), Milk Transport, Inc., seeks, among other things, a certificate, under the "grandfather" clause of Section 7(c) of the Transportation Act of 1958, to transport citrus juices, in bulk, in tank vehicles;

It further appearing, That in No. MC-113255 (Sub-No. 9), Milk Transport, Inc., seeks, among other things, a certificate of public convenience and necessity to transport citrus juices, in bulk, in tank vehicles, under the so-called "interim" provisions of Section 7(c) of the Transportation Act of 1958;

It further appearing, That applicant's position is that citrus juices, in bulk, in tank vehicles, were exempt commodities under Section 203(b)(6) of the Interstate Commerce Act prior to its amendment by the Transportation Act of 1958, and that it was in bona fide transportation of the commodity on and prior to May 1, 1958, from and to some points, and prior to August 12, 1958, from and to other points, and that it is entitled to "grandfather" and "interim" rights under Section 7(c) of the Transportation Act of 1958;

It further appearing, That in Watkins Motor Lines, Inc., Interpretation of Certificates, 64 M.C.C. 455, it was found

that the term "agricultural commodities (not including manufactured products thereof)" as used in Section 203(b)(6) of the Interstate Commerce Act, does not include citrus juices;

And it further appearing, That as citrus juices, in bulk, in tank vehicles, was not included in the term "agricultural (including horticultural) commodities (not including manufactured products thereof)," as used in Section 203(b)(6) of the Interstate Commerce Act prior to the Transportation Act of 1958:

It is ordered, That the applications in Nos. MC-113255 (Sub-No. 8) and MC-113255 (Sub-No. 9), be, and they are hereby, dismissed insofar as authority is sought therein under Section 7(c) of the Transportation Act of 1958 to transport citrus juices, in bulk, in tank vehicles.

By the Commission, division 1.

HAROLD D. McCOY,
Secretary.

(SEAL)

APPENDIX C

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 22nd day of December, A.D. 1959.

No. MC-113255 (Sub-No. 8)

MILK TRANSPORT, INC.,
"GRANDFATHER" APPLICATION
(New Brighton, Minn.)

No. MC-113255 (Sub-No. 9)

MILK TRANSPORT, INC.,
"INTERIM" APPLICATION

Upon consideration of the record in the above-entitled preceding, and of:

(1) Petition of applicant, filed October 19, 1959, for reconsideration of the order dated September 4, 1959, by the Commission, division 1, dismissing the applications in Nos. 113255 (Sub-No. 8) and MC-113255 (Sub-No. 9) insofar as authority is sought therein under section 7(c) of the Transportation Act of 1958, to transport citrus juices, in bulk, in tank vehicles;

(2) Reply by Class I Rail Carriers in Western District, Protestants, filed October 29, 1959;

and good cause appearing therefor:

It is ordered, That the said petition be, and it is hereby, denied, for the reasons (1) that the said order of September 4, 1959, was entered in accordance with the law after it appeared that the authority applicant seeks to transport citrus juices, in bulk, in tank vehicles, properly may not be made the subject of an application for authority under section 7(c) of the Transportation Act of 1958, and (2) that no sufficient cause appears for vacating the order of September 4, 1959,

or for further considering the portions of the applications dismissed by that order.

By the Commission.

HAROLD D. McCOY,
Secretary.

(SEAL)

APPENDIX D

Section 203(b)(6), Part II, Interstate Commerce Act, as amended by Section 7(a) of the Transportation Act of 1958

"(b) Nothing in this part, except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment shall be construed to include * * *. (6) motor vehicles used in carrying property consisting of ordinary livestock, fish (including shellfish), or agricultural (including horticultural) commodities (not including manufactured products thereof), if such motor vehicles are not used in carrying any other property, or passengers, for compensation: *Provided*, That the words 'property consisting of ordinary livestock, fish (including shell fish), or agricultural (including horticultural) commodities (not including manufactured products thereof)' as used herein shall include property shown as 'Exempt' in the 'Commodity List' incorporated in ruling numbered 107, March 19, 1958, Bureau of Motor Carriers, Interstate Commerce Commission, but shall not include property shown therein as 'Not exempt': *Provided further, however*, That notwithstanding the preceding proviso the words 'property consisting of ordinary livestock, fish (including shell fish), or agricultural (including horticultural) commodities (not including manufactured products thereof)' shall not be deemed to include frozen fruits, frozen berries, frozen vegetables, cocoa beans, coffee beans, tea, bananas, or hemp, and wool imported from any foreign country, wool tops and noils, or wool waste (carded, spun, woven, or knitted), and shall be deemed to include cooked or uncooked (including breaded) fish or shell fish when frozen or fresh (but not including fish and shell fish which have been treated for preserving, such as canned, smoked, pickled, spiced, corned or kippered products); * * *."

APPENDIX E

7(c), Transportation Act of 1958

"(c) Subject to the provisions of section 210 of the Interstate Commerce Act, if any person (or its predecessor in interest) was in bona fide operation on May 1, 1958, over any route or routes or within any territory, in the transportation of property for compensation by motor vehicle made subject to the provisions of part II of that Act by paragraph (a) of this section, in interstate or foreign commerce, and has so operated since that time (or if engaged in furnishing seasonal service only, was in bona fide operation on May 1, 1958, during the season ordinarily covered by its operations and has so operated since that time), except in either instance as to interruptions of service over which such applicant or its predecessor in interest had no control, the Interstate Commerce Commission shall without further proceedings issue a certificate or permit, as the type of operation may warrant, authorizing such operations as a common or contract carrier by motor vehicle if application is made to the said Commission as provided in part II of the Interstate Commerce Act and within one hundred and twenty days after the date on which this section takes effect. Pending the determination of any such application, the continuance of such operation without a certificate or permit shall be lawful. Any carrier which on the date this section takes effect is engaged in any operation of the character specified in the foregoing provisions of this paragraph, but was not engaged in such operation on May 1, 1958, may under such regulations as the Interstate Commerce Commission shall prescribe, if application for a certificate or permit is made to the said Commission within one hundred and twenty days after the date on which this section takes effect, continue such operation without a certificate or permit pending the determination of such application in accordance with the provisions of part II of the Interstate Commerce Act."

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 95

MILK TRANSPORT, INC., APPELLANT

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c) of the Revised Rules of this Court, appellees United States of America and Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment of a three-judge district court dismissing a complaint seeking to set aside an order of the Interstate Commerce Commission. The Commission order dismissed, without a hearing, applications for interim and "grandfather" operating rights filed under Section 7(c) of the Transportation Act of 1958 by a motor carrier.

The Statutory Background and Provisions.—Prior to the Transportation Act of 1958, Section 203(b)(6) of the Interstate Commerce Act (49 U.S.C. (1952 ed.) 303(b)(6)) exempted from the certification requirements of the latter Act motor vehicles used in carrying "agricultural (including horticultural) commodities (not including manufactured products thereof)." In 1956, this Court held that fresh and frozen dressed poultry are "agricultural" commodities and not "manufactured" products thereof within the foregoing exemption, and that certificate authority was therefore not required to transport those commodities. *East Texas Motor Freight Lines, Inc.* v. *Frozen Food Express,* 351 U.S. 49. The Court stated (p. 54) that "where the commodity retains a continuing substantial identity through the processing stage we cannot say that it has been 'manufactured' within the meaning of §203(b)(6)"; and that "manufactured" could not be "expand[ed] * * * to include such incidental processing as is involved in dressing and freezing a chicken." Following that decision, several district courts held that various agricultural products which the Commission had previously deemed non-exempt manufactured products were exempt non-manufactured products.[1]

On March 19, 1958, the Commission's Bureau of

[1] *Consolidated Truck Service, Inc.* v. *United States*, 144 F. Supp. 814 (D. N.J.); *Home Transfer & Storage Co.* v. *United States*, 141 F. Supp. 599 (W.D. Wash.), affirmed, 352 U.S. 884; *Premier Peat Moss Corp.* v. *United States*, 147 F. Supp. 169 (S.D. N.Y.), affirmed, 355 U.S. 13; *Frozen Food Express* v. *United States*, 148 F. Supp. 399 (S.D. Tex.), affirmed *sub nom. Akron, Canton & Youngstown R. Co.* v. *Frozen Food Express*, 355 U.S. 6.

Motor Carriers issued Ruling No. 107, which placed various agricultural products in either the "exempt" or the "non-exempt" category. Among the products listed as "non-exempt" were citrus juices; the Commission had held three years earlier, before this Court's decision in the *East Texas* case, *supra,* that such juices were non-exempt, *i.e.,* manufactured. *Watkins Motor Lines, Inc., Interpretation of Certificate,* 64 M.C.C. 455.

In Section 7(a) of the Transportation Act of 1958 (72 Stat. 573), Congress amended the agricultural exemption in Section 203(b)(6) by adding two provisos. It provided that the words "agricultural * * * commodities (not including manufactured products thereof)" (1) "shall include property shown as 'Exempt' in the 'Commodity List' incorporated in ruling numbered 107, March 19, 1958, Bureau of Motor Carriers, Interstate Commerce Commission, but shall not include property shown therein as 'Not exempt' "; and (2) that, notwithstanding the foregoing proviso, the words shall not include, *inter alia,* the following eleven agricultural commodities: frozen fruits, frozen berries, frozen vegetables, cocoa beans, coffee beans, tea, bananas, hemp, imported wool and certain types of domestic wool. 49 U.S.C. 303(b). Section 7(c) of the 1958 Act (72 Stat. 573) provided "grandfather rights" for any person who was in bona fide operation on May 1, 1958, "in the transportation of property for compensation by motor vehicle made subject to the provisions of [the Interstate Commerce] Act by paragraph (a) of this section * * *."

The Facts of this Case.—Appellant is a certificated common carrier by motor vehicle, which is primarily

authorized to transport milk and milk products. Since November 1957 it has from time to time also transported citrus juices. The latter transportation admittedly is not authorized by its certificate.

On December 10, 1958, appellant filed, pursuant to Section 7(c) of the 1958 Act, a grandfather application for a certificate to transport citrus juices and an application for interim authority to do so. It contended that, in view of the court decisions subsequent to the Commission's *Watkins* decision holding that citrus juices are not exempt (pp. 2–3, *supra*), the transportation of citrus juices was within the agricultural exemption on May 1, 1958; and that its transportation of the product on that date therefore constituted a bona fide operation which gave it grandfather rights.

The Commission (Division 1) dismissed the applications without a hearing, on the ground that prior to the critical grandfather date under the 1958 Act, citrus juices were not exempt agricultural commodities under Section 203(b)(6) (J.S. 25–26). The full Commission denied reconsideration (J.S. 27–28).

The appellant then filed a complaint in the district court seeking a reversal of the Commission's order and a direction to the agency to "hear and determine" the applications (J.S. 16). The district court dismissed the complaint (J.S. 24). It held (J.S. 15–24) that the transportation of citrus juices was not given "grandfather" rights by Section 7(c) of the 1958 Act, and that it was accordingly unnecessary to consider whether such juices were exempt agricultural commodities prior to that Act.

ARGUMENT

This case involves a narrow issue relating to the construction of the "grandfather clause" of Section 7(c) of the Transportation Act of 1958, 72 Stat. 573.[2] That clause applies to the carriage of commodities which had previously been exempted from the certification requirements of the Interstate Commerce Act by the agricultural commodity clause of Section 203 (b)(6) of the Act, but which were "made subject" to the Act by Section 7(a) of the 1958 Act. The specific issue is the applicability of the clause to a commodity, citrus juices, which prior to the 1958 Act has been expressly found by the Commission to be "not exempt," but which, under the rationale of several court opinions construing the agricultural exemption with respect to other commodities, allegedly might have been classified as exempt if the issue had ever gone to litigation.

Section 7(a) of the 1958 Act added two provisos to the agricultural commodity clause of Section 203(b)(6), the first of which expressly froze the status of a large number of commodities as "exempt" or "not exempt" in accordance with Ruling 107 of the Commission's Bureau of Motor Carriers issued shortly before the Act was passed. Appellant contends that Section 7(a) "made subject" to the Act all commod-

[2] Of the 950 applications for grandfather rights filed within the 120-day period specified in Section 7(c) of the 1958 Act, nearly 850 have been disposed of. None of these cases involved subsequent court action raising the question presented here, although it is involved in two actions pending in the district courts arising out of Commission suspensions of tariffs filed by persons claiming grandfather rights.

ities which, under a proper interpretation of the prior language, would have been held "exempt" but which were classified as "not exempt" by incorporation of the Commission ruling into the Act. As we show below, however, the district court properly construed the grandfather clause as applying solely to the particular commodities expressly "returned to regulation" (see *infra*, p. 8) by the second proviso added to Section 203(b)(6) by Section 7(a) of the 1958 Act.

1. It is axiomatic that since a "grandfather clause confers a special privilege, * * * [it] is to be held to extend only to carriers plainly within its terms." *Gregg Cartage Co.* v. *United States*, 316 U.S. 74, 83; see also *McDonald* v. *Thompson*, 305 U.S. 263; *Piedmont & Northern Ry. Co.* v. *Interstate Commerce Commission*, 286 U.S. 299. Moreover, as the district court pointed out (J.S. 19), the granting or withholding of "grandfather" rights is purely discretionary with the Congress. Even if citrus juices had been previously exempt from regulation and were now being brought under regulation for the first time, there was no necessity for Congress to confer grandfather rights upon the carriers of that product. Cf. *Prudential Insurance Co.* v. *Benjamin*, 328 U.S. 408, 434. The district court was thus clearly correct in looking first to the language and history of the grandfather clause to determine whether it had any application to commodities other than those expressly referred to in Section 7(a) of the 1958 Act.

In view of the clear legislative history that only the commodities specified in the second proviso were given

grandfather protection (*infra*, pp. 8–9), appellant is per force required to claim that the language of the grandfather clause is so unambiguous as to preclude resort to legislative history. Its argument is that the operative language—"transportation of property * * * made subject to the provisions of [the Interstate Commerce] Act by paragraph (a) of this section"—applies to both of the provisos added to Section 203 (b)(6), and not just to the second. The flaw in this argument is that the first proviso, unlike the second, does not purport to subject any type of previously exempt transportation to Commission regulation. It merely continues the status as exempt or non-exempt of various commodities previously classified by the Commission on the basis of then controlling interpretations of the Act.[3] The first proviso can thus be said to have "made" particular commodities "subject" to the Act only to the limited extent that the commodity was erroneously classified as "not exempt" in the Commission Ruling No. 7 and erroneously confirmed as such by the Congress. Assuming *arguendo* that this interpretation (which would require analysis of the application of the prior language of Section 203 (b)(6) to each of the many products classified as "not exempt" by the Commission) is a possible read-

[3] The Commission's Bureau of Motor Carriers in Ruling No. 107 took cognizance of existing court interpretations of Section 203(b)(6). It did so not only with respect to the particular commodities involved, but also with respect to a number of other commodities which the Bureau considered controlled by these decisions, despite prior unreviewed determinations by the Commission to the contrary. See H. Rep. No. 1922, 85th Cong., 2d Sess., pp. 36–37.

ing of the grandfather clause, it is patently not so clearly correct as to make resort to the legislative history unnecessary or inappropriate.

2. The legislative history of the 1958 Act removes any doubt that the grandfather clause is limited to the particular commodities listed in the second proviso of Section 7(a). The House Report on the bill describes the effect upon the regulatory scheme of the various judicial decisions broadly interpreting the agricultural commodity clause of Section 203(b)(6), and recognizes that "it is conceivable that a considerable number of other commodities will be held to be exempt" (H. Rep. No. 1922, 85th Cong., 2d Sess., p. 17). It then goes on to state (*ibid.*):

> It is important that this trend be halted before the position of the regulated carriers is more seriously impaired. The committee, therefore, recommends a freezing, *with a small rollback*, of the agricultural exemption in accordance with ruling No. 107 * * *. This amendment would halt further expansion of the scope of the exemption, and it would *return to economic regulation* the transportation of frozen fruits, frozen berries, frozen vegetables, coffee, tea, cocoa, hemp, imported wool and certain categories of domestic wool * * *.
>
> Any person engaged on June 1, 1958, in trucking *the aforementioned commodities which are returned to regulation* by this amendment would be entitled upon application to a certificate or permit allowing him, under regulation, to continue hauling the same commodities within the same areas or between the same points. [Emphasis added.]

See also S. Rep. No. 1647, 85th Cong., 2d Sess., p. 23; H. Rep. No. 2274, 85th Cong., 2d Sess., p. 15; 104 Cong. Rec. 15528.

It is thus clear that Congress extended grandfather rights only to the specific commodities whose previously exempt status was expressly rescinded by the second proviso of Section 7(a); and that only these commodities were considered to have been "made subject" to the Act by Section 7(a). Other commodities, including citrus juices, were frozen by the first proviso of Section 7(a) in the "not exempt" category they might otherwise have been able to escape through future litigation. But they were not thereby "returned to regulation" and thus "made subject" to the Act.

3. The other points raised by the appellant require no extended discussion. The present determination is fully consistent with the Commission's uniform interpretation of the grandfather clause of the 1958 Act since its enactment,[4] and nothing in *Inland Motor Freight "Grandfather" Application*, 83 M.C.C. 543 (J.S. 19) is to the contrary. That case, as the court below pointed out (J.S. 21), involved the question whether commodities, otherwise exempt from regulation under the provisos to Section 203(b)(6), lose their exemption when carried in the same vehicle as non-exempt commodities. The case does not suggest

[4] See *Twine and Crude Rubber—Emery Transportation Company*, 311 I.C.C. 226 (Div. 3, 1960); *Various Commodities Between Points and Places in U.S.*, 309 I.C.C. 573 (Div. 3, 1960); *Cooked Vegetables and Juices Between Points in U.S.*, 309 I.C.C. 46 (Div. 3, 1959); *Citrus Fruit Juice to Central and Midwest Territories*, 308 I.C.C. 552 (Div. 3, 1959); *Coffee Beans Other Than Green*, 308 I.C.C. 495 (Div. 3, 1959).

that grandfather rights are to be extended to commodities considered non-exempt both before and after the 1958 amendment. Nor is it relevant that the Commission denied petitioner grandfather rights primarily upon the ground that citrus juices were not exempt from regulation under the pre-1958 language of the agricultural commodity clause. For since the issue whether appellant had grandfather rights is solely one of law, rather than a matter committed to agency discretion, the district court was justified in itself deciding that appellant had no grandfather rights—even though its ground for decision was not that given by the Commission. *Ruth Elkhorn Coals, Inc.* v. *Mitchell,* 248 F. 2d 635, 638, n. 4 (C.A.D.C.); cf. *Securities and Exchange Commission* v. *Chenery Corporation,* 318 U.S. 80, 88.

CONCLUSION

The decision below is correct, and this appeal presents no question warranting plenary review by this Court. The judgment of the district court should be affirmed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. [redacted] 95

MILK TRANSPORT, INC., *Appellant,*

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellees,*

and

ALTERMAN TRANSPORT LINES, INC. AND REFRIGERATED TRANSPORT CO., INC., *Intervenors.*

On Appeal From the United States District Court for the District of Minnesota, Third Division

MOTION TO AFFIRM

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July 14, 1961

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 973

MILK TRANSPORT, INC., *Appellant*,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellees*,

and

ALTERMAN TRANSPORT LINES, INC. AND REFRIGERATED TRANSPORT CO., INC., *Intervenors*.

On Appeal From the United States District Court for the District of Minnesota, Third Division

---

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1 (c) of the Revised Rules of this Court, Intervenors Alterman Transport Lines, Inc. and Refrigerated Transport Co., Inc., move that the judgment of the District Court be affirmed.

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I. STATEMENT

This is a direct appeal from the judgment of a three-judge district court (December 21, 1960, 190 F. Supp. 350) sustaining the orders of the Interstate Commerce Commission in *Milk Transport, Inc., Grandfather Application*, MC 113255 Sub 9, and *Milk Transport, Inc., Interim Application*, MC 113255 Sub 8, in which the Interstate Commerce Commission, denying appellant's claim to grandfather and interim authority, held that the transportation of citrus juice in bulk, in tank vehicles, was not exempt from regulation prior to the effective date of the Transportation Act of 1958. The Interstate Commerce Commission held that citrus juices were not included in the term "agricultural (including horticultural) commodities (not including manufactured products thereof)" as used in Section 203 (b)(6) of the Interstate Commerce Act prior to the Transportation Act of 1958. Accordingly the appellant did not have a claim to grandfather rights under which it could file a grandfather application and enjoy the rights of a grandfather operator to continue in operation and to subsequently receive a certificate of public convenience and necessity conforming to such an operation.

II. QUESTIONS PRESENTED BY APPEAL

Appellant contends that there are two questions presented and this motion to affirm is directed toward the second, "was the transportation of citrus juices 'exempt' under Section 203 (b)(6) of the Interstate Commerce Act prior to its amendment by Section 7 (a) of the Transportation Act of 1958?" Intervenors direct their reply mainly to this specific point raised by appellant because this was their primary interest in the proceeding before the District Court.

The three-judge court held that this question is not material to the issues herein because the statute does not provide for relief for a motor carrier transporting citrus juice prior to the amendment of the Act even if the commodity were considered exempt.

III. WERE CITRUS JUICES EXEMPT FROM ECONOMIC REGULATION PRIOR TO THE PASSAGE OF SECTION 7(c) OF THE TRANSPORTATION ACT OF 1958?

Appellant endeavors to over simplify the issues in their argument that the only question to be decided is whether the commodity was exempt under the provisions of the Interstate Commerce Act prior to the 1958 amendment. Appellant argues that citrus juice is not a "processed" or a "manufactured" commodity and that the act of squeezing an orange is not an "act of manufacture." The issues in this proceeding are not as simple as appellant would imply.

Although this is the first time the question has been presented to the court, defendant-intervenors have transported the commodity for many years under certificates of public convenience and necessity issued by the Interstate Commerce Commission specifically authorizing that transportation service. We emphatically contend that the commodity is not exempt from regulation, has never been considered by the industry as being exempt, and that only appellant and one other motor carrier have contended otherwise. In MC 110190 Sub 22, Penn Dixie Lines of York, Pa., made this same argument that the juice was exempt but failed to press the claim before the Commission. That case was decided by the Commission along with *Wethins Motor Lines Interpretation of Certificate*, 61 M.C.C. 455. Penn Dixie withdrew its contention that the commodity was exempt.

The Interstate Commerce Commission, being an administrative agency of the Federal Government, is required by statute in the exercise of its duties to determine whether this commodity was or was not exempt from regulation. The agency's decision on this point is entitled to the highest respect of the courts. *Driscoll* v. *Edison Light and Power Co.*, 307 U.S. 104. A construction of doubtful correctness by an agency should be sustained and only where such action is manifestly wrong should the court fail to sustain the agency. *Costanzo* v. *Tillinghast*, 287 U.S. 341. If there is a possibility of more than one interpretation of the statute, that of the Commission should prevail. We contend that the District court has properly decided the question in this case.

IV. WHAT IS THE COMMODITY INVOLVED IN THIS PROCEEDING?

Though appellant relies upon testimony of a witness appearing in a more recent application case, that testimony can in no way be considered authoritative or controlling—due in part to the broad generalities which characterize the many intricate processes of manufacturing citrus juice on a commercial scale. This record is barren of any facts upon which this Court may predicate a decision that citrus juices are not manufactured products within the meaning of Section 203 (b) (6). The Commission, in the reasonable exercise of its powers, refers to the controlling case of *Watkins Motor Lines Interpretation of Certificate*, 61 M.C.C. 455, in denying appellant's Sub 8 and Sub 9 applications. Appellant Milk Transport, however, continued the transportation of this traffic without regard to the Commission's decision. We quote the *Watkins*

case to show the Commission's reasoning in dismissing appellant's applications:

> After extracting the juice from oranges, without concentration, it is irradiated under a patented process, using ultra violet rays. When taken from the pans in which it is irradiated its temperature is approximately 70 . Immediately thereafter, it is cooled to 28 or 29 , and then put into cardboard cartons similar to milk cartons.
>
> * * *
>
> So prepared, the commodity contains certain enzymes that cause chemical change. The ultra violet ray treatment serves to deactivate such enzymes and to slow down the chemical changes by killing certain bacteria, yeast, and molds that are unavoidably added to the orange juice in the extracting process. Although the irradiating process lowers the yeast count by 60 to 75 percent and lowers the enzyme activities from 40 to 75 percent, some of the bacteria are still present, and, to prevent them from multiplying or growing, it is necessary to keep the product at a temperature of 30 or lower. By means of the irradiation process and the indicated temperature control, the product remains marketable for a period of 10 or 11 days after it is shipped.
>
> * * *
>
> The juice of fresh citrus fruit is machine extracted and immediately thereafter reduced in temperature to between 30 and 26 . It is then packaged in cardboard containers, similar to milk cartons which are coated with a paraffin wax to assist in maintaining the fresh quality of the commodity. It is kept at all times, including the period of transportation, under refrigeration at the temperature above indicated in order to effect the maximum period of freshness without freezing. This commodity must be packaged, loaded, and

moved to consumers within 48 hours from the time it is extracted from the fruit at the mill. It is essential that it be maintained at a temperature sufficiently high to prevent the forming of ice crystals and sufficiently low to preserve its freshness. *Penn-Dixie contends that the commodity above described is an agricultural commodity, admittedly "processed, but not rising to the state of a 'manufactured product thereof,' and that the transportation thereof is exempt under section 203 (b) (6) of part II of the Interstate Commerce Act."* (457-458) (Emphasis supplied)

* * *

No. MC-110190 (Sub-No. 22).—The question presented by Penn-Dixie's motion is whether fresh orange juice is an agricultural commodity and, thus, exempt, or whether it is a manufactured product of an agricultural commodity, the interstate transportation of which is subject to regulation under the act. Penn-Dixie asserts that the extracting of the juice from the oranges, the cooling of the juice, and the packaging thereof in cardboard containers does not constitute a manufacturing process although, admittedly, it is "processing" of a type. In *Determination of Exempted Agricultural Commodities*, 52 M.C.C. 511, we said (page 521):

The definition of the word "manufacture" adopted by the Court in *Fruit Growers, Inc.* v. *Brogdex Co., supra* (283 U.S. 1) in our opinion is appropriate for application here, and we conclude that the portion of the term "(not including manufactured products thereof)" means agricultural commodities in their natural state and those which, as a result of treating or processing, have not acquired new forms, qualities, properties, or combinations.

That the extracting of juice from an orange creates a new form cannot be gainsaid. Instead of

> a fruit we have a potable liquid. The orange enters the extractor as an agricultural commodity and emerging therefrom are skins, seeds, pulp, and, in our opinion, a manufactured product of the orange, namely, orange juice. This conclusion is sound despite the argument of petitioner, with which we agree, that packaging of a commodity is not a manufacturing process in and of itself. (459)

The Commission recognized the magnitude of the problem and gave more than due consideration to the physical characteristics of the commodity. The above-cited portion of the *Watkins* case indicates that the interpretation of the law under which the Commission based its final decision was not an unreasonable interpretation. We respectfully submit that the determination of the status of citrus juices requires that there be an exact commodity identification. The appellant has described the commodity as "juice removed from its natural environment, the orange," which is "prior to transportation, pasteurized and then cooled to first destroy bacteria and then inhibit further bacterial growth." Appellant argues that citrus juice is a basic agricultural commodity and not a manufactured product, claiming that the controlling decision in interpreting Section 203 (b)(6) is that found in *East Texas Motor Freight Line* v. *Frozen Food Express*, 351 U.S. 49. The *East Texas* decision was founded on the so-called "substantial identity" test. Citing that case the appellant asks this Court to adopt a holding that citrus juice is substantially identical to the orange in its natural state and hence enjoyed the same exemption as the unaltered natural fruit. There are different methods of preparing citrus juice for shipment, as evidenced by the *Watkins* case, *supra*, and the shipper testimony cited by appellant. Although the method-

are not so materially different as to result in a different end product, there is more involved in the processing than the mere pressing of the juice from the orange.

From the *Watkins* case it is clear that there are three major steps in processing the raw orange. First the oranges are placed in bins, washed and the juice extracted. During this process some of the oranges are rejected. Various types of machinery are used in the manufacturing process including the extractor and a refrigerator component, made up of filters and a compressor. Tied into the production line is flash-heating equipment which represents a tube nest and a boiler and automatic regulating control or machinery to apply ultraviolet light to the juice. A primary factor affecting the marketability of the juice is the degree of freshness, and thus a preservative process takes place after the extraction wherein the application of temperature extremes or ultra violet light inhibits the growth of bacteria and ever-present enzymes.

Thus there not only is a physical change in the product from a spherical fresh fruit to a highly treated fruit juice, there is also an organic change in the juice itself. The juice, once a part of the cellular structure of the orange, has been organically changed to retard its normal bacterial growth and enzymatic action. We therefore contend that there is sufficient evidence for the Court to find that in the course of commercial extraction and treatment sufficient processing has taken place to effect a merger of the various steps into a single manufacturing process and that this removes the juice from the agricultural commodity exemption. There is more than a mere "incidental or preliminary processing" as mentioned by the court in *Home Transfer & Storage Co.* v. *U. S.*, 141 F. Supp. 599. What

was once an orange is now a "potable liquid." There has been, in fact, a creation of a new product.

Juice extraction processes are more complex and detailed than the plaintiff would have the court believe. The Interstate Commerce Commission developed sufficient factual data on the specific charcteristic of this commodity and the multiplicity of process required to produce citrus juices. We feel that the Commission has issued a decision which is not arbitrary or capricious in any respect.

V. IS THE SUBSTANTIAL IDENTITY TEST THE ONLY TEST TO DETERMINE WHETHER THE COMMODITY WAS EXEMPT FROM ECONOMIC REGULATION PRIOR TO THE RECENT AMENDMENT TO THE INTERSTATE COMMERCE ACT?

Appellant takes the position that citrus juice was exempt from economic regulation prior to the recent amendment to the Act, basing this position on the so-called "substantial identity" test as set forth in the *East Texas* case, *supra*. Appellant argues that application of this test to citrus juice shows no substantial change which would remove the commodity from the agricultural exemption.

We believe that before the Court decides this issue it should consider the distinction between the facts in the *East Texas* case and those involved here. In the *East Texas* case the two commodities involved were fresh and frozen meat and fresh and frozen dressed poultry. The Commission held that neither fresh or frozen meats nor fresh or frozen dressed poultry were within the exemption of Section 203 (b)(6). The District Court sustained the Commission in its determination of these commodities and no appeal was taken on the

portion of the decision covering fresh and frozen meat. However, in the decision of this Court, 5 members to 4 members, it was held that fresh and frozen dressed poultry was exempt from economic regulation. This Court based its decision on the "substantial identity test" holding in effect that if an end product has retained its substantial identity with the beginning or raw agricultural product it is not a "manufactured" product when it has been subjected to only *incidental* and *preliminary* processing. We do not argue against the so-called substantial identity test set forth by this Court with respect to the transportation of dressed poultry, in view of the fact that it is visually identifiable with what was once a live fowl. Applying this test to citrus juice, however, we arrive at a contrary conclusion—that citrus juice is not a fruit, it is a juice.

When we examine a raw orange as it grows on the tree we see a spherical organic fruit containing juice or liquid which in itself is potable when once removed. Additionally, we are aware that anyone can drink or consume this liquid and/or the pulp thereof without any extraction process. We have often consumed the orange segments once having peeled the orange, grapefruit or tangerine. Let us take that same orange, grapefruit or tangerine and proceed to send it through extractors, temperature change machinery, destroy its bacteria content and increase the longevity of the commodity by retarding the enzymatic process and we have what was referred to in the *Watkins* case, *supra*, as a "potable liquid." It is doubted that anyone can dispute that there has now been a change in a high-moisture-content marketable solid fruit into what is now for the most part a complete liquid. The end product is a liquid and not only different from the raw

orange, grapefruit or tangerine in appearance but also differs from the home-produced juice in that the commercially extracted juice has been subjected to various treatments for preservation. Indeed, it might be said that the obstruction of enzymatic action by heat or light is a preservative process changing the original juice into a manufactured product in that it constitutes an effort to change the natural biochemical characteristics of the fruit.

In the *East Texas* case this Court was very careful to point out that the process of killing and dressing a chicken merely "made it ready for market" and did not turn it into a "manufactured" commodity. If this Court had decided otherwise then the agricultural exemption with respect to poultry would be meaningless since practically all poultry is killed and dressed before being placed in commerce. A contrary decision would have meant that only "live" poultry would be exempt. If that had been the intent of Congress the statute would have contained the term "live poultry" in like manner as "ordinary livestock." This Court has stated "at some point processing and manufacturing will merge" but draws a distinction between the two and states that "where the commodity retains a substantial identity through the processing stage" it is not "manufactured" within the meaning of the statute.

On this point the United States District Court for the Southern District of Texas, Houston Division, made some very pertinent comments in *Frozen Food Express* v. *U. S.*, 148 F. Supp. 399:

> We likewise hold non-exempt, under the evidence which deals with commercial creamery products, as "manufactured products" of agricultural commodities, the following: cottage cheese; cream

> cheese; butter; cottonseed meal; fruits and vegetables canned; milk condensed. Each of these products has acquired a new identity, with new properties, and is devoted to new and different uses than its original principal ingredient. As result of combination with other constituents, of treatment and processing by varied types of machinery and equipment, a new product has emerged. If the semanticist urges that a can of peaches or of condensed milk may not properly be described as a "manufactured product", it may well be that these items illustrate the point at which processing merges with manufacturing.

The District Court's reference to canned fruits and vegetables is quite informative in showing how processing and manufacturing can merge into a single process. It is difficult to argue that a "canned tomato" is not a tomato. In fact, a canned tomato is a tomato just as a "killed and dressed chicken" is still a chicken. Nevertheless, one is non-exempt and the other is exempt from regulation under the provisions of the Interstate Commerce Act. Also in *Frozen Foods, supra,* the District Court, applying the same test this Court applied, found that pasteurized milk is exempt and butter made from the milk is not exempt. Although nothing is added to the milk through the churning process there is a substantial loss of identity and therefore the product is no longer milk. Can that be said of the canned tomato? Is there not "substantial identity" between the canned tomato and the fresh tomato? The "substantial identity test" must not, therefore, be the only test. We believe that one must look at the processing involved.

In *Home Transfer, supra,* some light is shed on this question. The commodities in that case were frozen

fruits and vegetables which the court determined were exempt:

> The processing of fresh fruits for quick freezing in this case is essentially nothing but adding sugars, sirups, and as to peaches ascorbic acid, to better preserve the fruits and improve their color and taste. Nothing but slicing of the fruit affects its physical form. The processing of fresh vegetables for quick freezing is to heat them, in some instances after first splitting them to hasten heat action, sufficiently to kill the enzymes, and then to follow with the desired degree of freezing. Although this process may produce noticeable discoloration, or may divide a stalky variety into two or more parts, *nothing is done to otherwise change the form of the vegetables.* In other respects than those mentioned, these processed fruits and vegetables *remain essentially in the same shape and form as non-processed fruits and vegetables.* (Emphasis supplied)

There does not seem much difference in the "substantial identity" between the frozen vegetables and the canned tomato in our example. Therefore it must be important to consider the processing involved. In the *Home* case there was only incidental and preliminary processing to prepare the commodity for market. In the example of the canned tomato, there was a complicated canning process resulting in a hermetically sealed can of tomatoes. In the *Home* case as in the *East Texas* case, the commodities were cut and sliced but "nothing is done to otherwise change the form" of either. Thus for a processed agricultural commodity to be found to be exempt under the decisions of the courts, including this Court, the processing must be

incidental or preliminary for the purpose of preparing the commodity for market *and* (not *or*) there must be substantial identity between the original and processed commodities.

In the instant case the form of the commodity has been changed from a solid to a liquid through a complicated process which changes the original character of the commodity both physically and organically. Thus there remains no substantial identity between the commodities and the processing is more than an incidental or preliminary process for preparation for marketing. It has become a manufacturing process.

Therefore, the *shape* or *form* of an agricultural commodity (as qualified by the *Home* case) has been changed and a *new product* has emerged (*Frozen Food* case). We submit that the transformation of the citrus fruit into a citrus juice has been the result of a merging of the processing into a manufacturing process which thoroughly justifies a finding by this Court that citrus juice was not exempt prior to the effective date of the transportation Act of 1958.

VI. THE PETITION DOES NOT PRESENT A SUBSTANTIAL QUESTION OF JURISDICTION

The petition of appellant does not raise any substantial question because the Interstate Commerce Commission has decided that the vehicles transporting citrus juice are subject to economic regulation and there is no decision by either the Commission or a court that such transportation is exempt from the provisions of the Interstate Commerce Act as the result of an interpretation of Section 203 (b)(6). Appellant's petition assumes that the prior transportation of citrus juice was exempt from regulation. We

believe that there has been no showing that such transportation is or has been exempt from regulation and it would appear that the whole basis of the appellant's case rests on whether a court *might* have decided that such transportation had been exempt. Unfortunately there was no appeal from the decision in the *Watkins* case and, based on the law as it now stands, there is nothing to indicate that the transportation of citrus juice was ever exempt and nothing to indicate that this appellant is entitled to any grandfather rights on the basis of past transportation of that commodity.

VII. CONCLUSION

We therefore submit that the appeal presents no substantial question and that the judgment of the District Court dismissing the complaint should be affirmed.

Respectfully submitted,

FRANK B. HAND, JR.
Attorney for Intervening Defendants

July 14, 1961

VIII. CERTIFICATE OF SERVICE

I, Frank B. Hand, Jr., attorney for intervening defendants, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 14th day of July, 1961, I served copies of the foregoing document on the following parties, by properly addressed prepaid first class or air mail:

1. Perry R. Moore, Esq., 1000 First National Bank Building, Minneapolis, Minnesota.
2. The Solicitor General, Department of Justice, Washington 25, D. C.
3. Miles Lord, Esq., United States Attorney, Federal Courts Building, St. Paul, Minnesota.
4. Robert W. Ginnane, Esq., General Counsel, Interstate Commerce Commission, Washington 25, D. C.

FRANK B. HAND, JR.

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In The

Supreme Court of the United States

October Term, 1961

No. 95

MILK TRANSPORT, INC., Appellant,

vs.

UNITED STATES OF AMERICA, et al.

On Appeal from the United States District Court
For the District of Minnesota

BRIEF IN OPPOSITION TO MOTIONS TO AFFIRM

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BRIEF IN OPPOSITION TO MOTIONS TO AFFIRM

I.

REPLY TO MOTION TO AFFIRM OF THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

The respondents, United States and the Interstate Commerce Commission, argue that Sec. 7(c) "grandfather" rights were intended by Congress to be restricted to carriers of those commodities named in the second proviso of Sec. 7(a) —frozen fruits, frozen berries, etc., to the exclusion of the commodities included in the first proviso of Sec. 7(a). This argument is, we believe, completely answered by the fact that Sec. 7(c) confers "grandfather" rights on existing carriers of commodities "made subject to" Part II of the Interstate Commerce Act "by *paragraph (a)* of this section." Sec. 7(c) does *not* state "*the second proviso* of paragraph (a)," and it

can safely be concluded that if Congress intended such a limited effect, it would have said so.

The respondents attempt to buttress their argument by the observation that, prior to the Act of 1958, only one Commission decision, *Watkins Motor Lines, Inc., Interpretation of Certificate*, 64 M.C.C. 445 (1955), dealt with citrus juices, and that the Commission therein held citrus juices to be non-exempt. The respondents then observe that the Act of 1958 was enacted before a federal court had the opportunity to rule on the status of citrus juice under former Sec. 203(b)(6). Therefore, it is said that, since a court had not had such an opportunity, the status of citrus juice prior to 1958 was non-exempt and the issue is now and forevermore foreclosed. The fallacy in this argument is that the *Watkins* case, supra, is merely a Commission interpretation of former Sec. 203(b)(6) and is not conclusive. If the *Watkins* case, supra, was wrong, in the light of the Supreme Court's interpretation of former Sec. 203(b)(6),[1] then citrus juices *were* "exempt" prior to the Act of 1958. This question can be decided now just as well as before the Act of 1958.

The appellant submits that it is clear that prior Commission decisions on the status of commodities under former Sec. 203(b)(6) were rendered authoritatively worthless after this Court announced the "continuing substantial identity" test in the *East Texas* case, supra.

The application of the "grandfather" rights of Sec. 7(c) depends upon the legal status of the commodity, before the Act of 1958, under former Sec. 203(b)(6) as interpreted by the Supreme Court, and upon the status after the Act of 1958. The status must have been changed by Sec. 7(a) of the Act of 1958 from "exempt" to "non-exempt."

---

[1] In *East Texas Motor Freight Lines, Inc., v. Frozen Food Express*, 351 U.S. 49; *Frozen Food Express v. United States*, 148 F. Supp. 399, aff'd 355 U.S. 6, among others.

The application of the "grandfather" rights of Sec. 7(c) cannot depend upon whether an appropriate case or controversy involving a commodity such as citrus juices happened to reach the Courts before the Act of 1958 was enacted.

The respondents have begged the question when they state on page 7 of their Motion:

> "The flaw in this argument is that the first proviso, unlike the second, does not purport to subject any type of the previously exempt transportation to Commission regulation. It merely continues the status as exempt or non-exempt of various commodities previously classified by the Commission on the basis of then controlling interpretations of the Act."

The very issue in this case is whether or not citrus juices were merely "continued" as non-exempt by the first proviso of Sec. 7(a) or whether citrus juices were exempt prior to Sec. 7(a) and were, therefore, "made subject to" Part II of the Interstate Commerce Act by Sec. 7(a). Appellant contends the latter, and if appellant is correct, the Sec. 7(c) "grandfather" clause is applicable and the matter must be remanded to the Commission.

The respondents accurately state the issue on page 7 of their Motion as follows:

> "The first proviso can thus be said to have 'made' particular commodities 'subject to' the Act only to the limited extent that the commodity was erroneously classified as 'not exempt' in the Commission Ruling 107 * * *."

One way of stating appellant's contention is that Ruling 107 does not accurately reflect the status of citrus juice under former Sec. 203(b)(6) as interpreted by the Supreme Court.

We might observe that Ruling 107 is not a ruling at all, but is merely a collection of various Court and Commission decisions prepared by the Commission to assist Congress in

drafting Sec. 7(a). The Congress merely incorporated Ruling 107 by reference for ease of draftsmanship. See *Inland Motor Freight "Grandfather" Application*, 83 M.C.C. 543. The first proviso of Sec. 7(a), with respect to citrus juices, should be read as if Congress had expressly stated:

> "The transportation of citrus juice is declared to be not exempt from the provisions of Part II of the Interstate Commerce Act."

The resort to the legislative history by the respondents aids them little. The House Report,[2] cited by respondents, indicates that carriers of the 11 specified commodities in the second proviso of Sec. 7(a) were to be given "grandfather" rights, a proposition with which appellant agrees. However, there is no language in the House Report which would indicate that the "grandfather" rights were to be limited to those carriers only. At best, the House Report is equivocal on that point.

The Senate Report,[3] on the other hand, comes even closer to Congress' true intent. It is stated:

> "Grandfather rights would also be provided. Any person engaged on January 1, 1958, in trucking commodities brought back under regulation by the above-described amendment of Section 203(b)(6) would be entitled to a Certificate or permit allowing him, under regulation, to continue hauling the same commodities within the same areas or between the same points."
>
> S. Rep., p. 23.

The Senate here refers to *any* commodity whose status, under law, was altered from "exempt" to "not exempt" by Sec. 7(a). No restrictive intent is indicated by the Senate Report.

Congress was clearly aware that under the Supreme Court's interpretation of former Sec. 203(b)(6) in the *East*

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[2]H. Rep. No. 1922, 85th Congress, 2nd Session.

[3]S. Rep. No. 1647, 85th Congress, 2nd Session.

Texas case, supra, and other cases, many commodities were, in law, "exempt," that had been previously held by the Commission to be not exempt. Congress was also aware that the previous holdings of the Commission on this subject conflicted so markedly with the Supreme Court's decision in the *East Texas* case, supra, that almost all of the Commission's decisions were nullified. Congress was also aware, then, when the first proviso of Sec. 7(a) made these commodities "not exempt" by statute that existing carriers of these commodities were being legally "made subject to" Part II of the Interstate Commerce Act for the first time. Congress then commendably preserved these carrier's existence by means of a "grandfather" clause, although after the Act of 1958 new carriers of those commodities would be required to seek certification under the regular provisions of Sec. 207 of Part II of the Interstate Commerce Act.

Congress may have the harsh power to refuse grandfather rights as it chooses, but this does not mean, as the lower court seemed to believe, that Congress in fact exercised that power with respect to citrus juice.

II.

REPLY TO THE MOTION TO AFFIRM OF INTERVENORS ALTERMAN AND REFRIGERATED

The intervenors have at least recognized that the only issue in this case is whether citrus juices were exempt, under the law, prior to the Act of 1958, although the intervenor's arguments in this respect are totally fallacious.

The intervenors, like the Commission in the *Watkins* case, supra, take the approach that citrus juice has no resemblance to the citrus fruit and that the act of extraction constitutes manufacturing. Both the intervenor and the Commission ignore the fact that citrus juice, itself, is created by nature

within the fruit as a separate element. The juice is contained in small readily observable sacs. Extraction does nothing more than rupture the sacs and free the juice. The juice is identical before and after extraction, in taste, appearance, and molecular structure. Whether inside or outside of the fruit, juice is still juice. Pasteurization and prechilling have no more significance than in the case of milk, which has always been held exempt by the Commission. See *East Texas Motor Freight Lines, Inc., v. Frozen Foods Express*, 351 U.S. at 53.

The creation of citrus juice, it seems obvious, lies elsewhere than in the hands of man.

We cannot grasp the relevancy of the intervenors' lengthy comments about canned tomatoes. We are talking here about citrus juice. Milk Transport, the appellant, proposes, if its applications are eventually granted by the Commission to transport citrus juices *in bulk*, in large insulated tank trailers, not in packages or cans. The canning of agricultural commodities may create problems regarding their status under Sec. 203(b)(6), but those problems are not present in this case.

The intervenors also comment that there may be many types of processing in the citrus juice industry and that there is no record in this case upon which to render a decision on this point. The lack of a record is due entirely to the Commission's arbitrary action in dismissing appellant's application without a hearing. However, a detailed description of the processing of citrus juices from company to company is not necessary, for it is clear that the act of extraction itself is the point of divergence between the appellant and the Commission. The appellant contends that extraction is not manufacturing, but merely constitutes the freeing of nature's product from its natural environment. The Commission ap-

parently believes that extraction is creative and is, therefore, "manufacturing."

There is no need to compile a record to establish that citrus juice is extracted from a citrus fruit, since there must be extraction of some kind to make citrus juice available to mankind, and the Court can take notice of this fact.

III.

CONCLUSION

The variety of approaches to this case is unusual.

The intervenors and the Commission (in its original Order, at least) take the view that the Sec. 7(c) "grandfather" clause is inapplicable because, under former Sec. 203(b)(6), citrus juices were a manufactured product and non-exempt, and therefore there had been no change of status from "exempt" to "non-exempt" by Sec. 7(a), as is required for Sec. 7(c) to apply.

The appellant contends that this is indeed the issue, but that citrus juices are not manufactured, and were, therefore, exempt prior to the Act of 1958, and that Sec. 7(a) "made" citrus juices "subject to" Part II.

The lower court, on the other hand, determined that the status of citrus juice prior to the Act of 1958 is immaterial, and that even if citrus juices were "made subject to" Part II by Sec. 7(a), the "grandfather" rights still do not apply, being restricted to carriers of the second proviso commodities of Sec. 7(a).

The Government's counsel, however, appear to argue that citrus juices were not exempt prior to the Act of 1958, because the old *Watkins* case, supra, had not been appealed and the Courts did not have time to rule specifically on citrus juices before the Act of 1958 was enacted. The respondents apparently saw this matter as some sort of a race to see

whether the Interstate Commerce Commission could reach Congress before Milk Transport could reach the federal courts.

The variety of approaches here, and the obvious necessity of an authoritative decision on this important subject matter, require plenary review by this Court.

Government counsel, by failing to support the Commission's original Order in this case, have apparently conceded that the Commission was initially in error. The intervenors, on the other hand, see so little merit in the lower court's decision that they choose to support the Commission's original order instead. Certainly, this case cannot be disposed of on a motion to affirm, unless it be to summarily reverse the lower court for its very clear error and remand to the Commission for the relief prayed for. The motions to affirm should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Perry R. Moore, one of the attorneys for appellants herein, and a member of the bar of the Supreme Court of the United States, hereby certify that, on the 28 day of ~~August~~ July, 1961, I served copies of the foregoing document on the several parties hereto, as follows:

1. On the United States, by mailing copies thereof in duly addressed envelopes with air mail postage prepaid, to Archibald Cox, the Solicitor General, Department of Justice, Washington 25, D. C., Lee Loevinger, Assistant Attorney General, Department of Justice, Washington 25, D. C., and Richard I. Solomon, Attorney, Department of Justice, Washington 25, D. C., and by mailing copy thereof in a duly addressed envelope, postage prepaid, to Miles Lord, United States Attorney, Federal Courts Building, St. Paul, Minnesota.
2. On the Interstate Commerce Commission, by mailing copies thereof, in duly addressed envelopes, with air mail postage prepaid, to Robert W. Ginnane, General Counsel, and Fritz R. Kohn, Attorney, Interstate Commerce Commission, Washington 25, D. C.
3. On the intervenors, by mailing a copy thereof, in a duly addressed envelope, with air mail postage prepaid, to Frank B. Hand, Esq., and Daniel B. Johnson, Esq., Transportation Bldg., Washington 25, D. C.

PERRY R. MOORE

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SUPREME COURT U. S.

No. 95

In the Supreme Court of the United States

OCTOBER TERM, 1961

MILK TRANSPORT, INC., Apellant,

vs.

UNITED STATES of AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

and

BRIEF AMICUS CURIAE

on behalf of

W. W. HUGHES d/b/a W. W. HUGHES
REFRIGERATED SERVICE

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September 1, 1961

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE ON BEHALF OF W. W: HUGHES, d/b/a W. W. HUGHES REFRIGERATED SERVICE

TO THE HONORABLE, THE CHIEF JUSTICE AND JUDGES OF THE SUPREME COURT OF THE UNITED STATES:

W. W. Hughes d/b/a W. W. Hughes Refrigerated Service hereafter called Hughes files this his motion for leave to file a brief amicus curiae prior to the consideration of the jurisdictional statement of appellant, Milk Transport, Inc., which is presently before your Honorable Court and in which case a motion to affirm has been filed by the United States of America and the Interstate Commerce Commission and answer thereto likewise having been timely filed by Milk Transport, Inc.

Hughes bases his motion for leave to file a brief amicus curiae on the facts recited below. The factual matters are all contained in the public records of the Interstate Commerce Commission.

Hughes filed an application with the Interstate Commerce Commission at Docket No. MC-105782, Sub 4, on December 8, 1958 seeking authority under the "grandfather" provision of Section 7 of the Transportation Act of 1958, 72 Stat. 573 (1958) 49U.S.C. § 303 (b) (6) (1958) to conduct operation in interstate or foreign commerce as a common carrier by motor vehicle over irregular routes between all points in the continental United States of any and all commodities shown in the Commodity List whether listed as exempt or not exempt incorporated in Administrative Ruling numbered 107, March 19, 1958, of the Bureau of Motor Carriers, Interstate Commerce Commission.

The application was assigned for hearing at Washington, D. C. on January 19, 1960. The Examiner to whom the matter was assigned issued a Recommended Report and Order

which was served on April 18, 1961. The proceeding is presently pending before the Interstate Commerce Commission by reason of exceptions to be filed both by Hughes and others supporting and opposing the application.

By petition dated June 29, 1961 the United States Department of Interior filed a petition for leave to intervene in the proceeding. By petition filed June 30, 1961 the National Fisheries Institute Inc., the same being a national trade association with offices at 1614 — 20th Street, N. W., Washington, D. C. This trade association is comprised of firms and local trade associations engaged in the business of shipping, receiving, producing, processing, wholesaling and retailing fishery products throughout the United States. By Order dated July 25, 1961 the Interstate Commerce Commission permitted the United States Department of Interior and the National Fisheries Institute Inc. to intervene and exceptions have been filed by them *in support* of the application of Hughes.

As shown in the Report and Order of the Examiner in the Hughes "grandfather" application, referred to above, at Docket No. MC-105782, Sub 4, Hughes is serving some 476 shippers and receivers of fresh, cold packed and frozen foods to and from and between all points in the continental United States. Likewise the ultimate consumers of these foods involves millions of people throughout the entire United States.

In the jurisdictional statement of Milk Transport, Inc., appellant in the present proceeding, the first question presented is as follows:

> "(1) Are the 'grandfather' and 'interim' provisions of § 7 (c) of the Transportation Act of 1958 applicable only to application for certificates to transport the 11 specified commodities in the second proviso of § 7 (a) of the Transportation Act of 1958, as was decided by the lower court, or, are said 'grandfather' and 'interim' provisions applicable to applications for certificates to transport *all* commodities 'made subject to' Part II of the Interstate Commerce Act by *both* the

first and second provisos of § 7 (a) of the Act of 1958, including citrus juices?"

The same issue is being litigated by Hughes before the Interstate Commerce Commission at the present time and specific ruling as to what commodities are subject to the "grandfather" provisions of Section 7 of the Transportation Act of 1958 is the primary legal issue involved. No final decision has been rendered.

In accordance with instructions from the Interstate Commerce Commission and with the applicable law, Hughes filed a tariff on December 8, 1958 to become effective January 7, 1959 setting forth rates and rules and regulations for the transportation of all commodities shown in the Commodity List whether listed as exempt or not exempt as incorporated in Administrative Ruling numbered 107, of the Bureau of Motor Carrier, Interstate Commerce Commission. This tariff was suspended and vacated by the Interstate Commerce Commission by Order dated June 15, 1960 effective August 5, 1960. Thereafter Hughes filed a complaint in the nature of an appeal in the United States District Court for the Eastern District of Pennsylvania in a proceeding captioned *W. W. Hughes d/b/a W. W. Hughes Refrigerated Service v. United States of America and Interstate Commerce Commission*, Civil Action No. 28304. By Order dated September 30, 1960 this statutory court enjoined the Interstate Commerce Commission from suspending or vacating the tariff of Hughes which in effect allows him to perform transportation between any and all points within the continental United States of not only the 11 commodities specified in the second proviso of Section 7 (a) of the Transportation Act of 1958 but any and all of the many and numerous commodities specified and listed in the Commodity List of Administrative Ruling numbered 107, of the Bureau of Motor Carriers, Interstate Commerce Commission, whether such commodities are listed as exempt or not exempt. This injunction is to remain in full force and effect until the Interstate Commerce Commission has finally decided whether or not

Hughes is entitled to "grandfather" authority for not only the 11 commodities enumerated in the second proviso of Section 7 (a) of the Transportation Act of 1958 or of all of the numerous enumerated commodities shown in the Administrative Ruling numbered 107, of the Bureau of Motor Carriers, Interstate Commerce Commission, which is made subject to the entire provisions of Section 7 (a) of the Transportation Act of 1958.

The present appeal therefore will not only determine the extent that appellant is authorized to apply for "grandfather" authority under Section 7 (a) of the Transportation Act of 1958 but also the extent that "grandfather" authority may be requested by Hughes and the many hundreds of other carriers in like circumstances. If the motion to affirm be allowed, it might well be Hughes would have to cease all operations other than the 11 specified commodities and be forever precluded from prosecuting his case and continuing his operation as required to obtain "grandfather" authority. Likewise, the United States Department of Interior has intervened in the Hughes proceeding and has an interest in the outcome of the present appeal as well as the National Fisheries Institute Inc. and, as stated above, the problem involves transportation at least insofar as Hughes is concerned of all the numerous commodities listed in the Commodity List of Administrative Ruling numbered 107, of the Bureau of Motor Carriers, Interstate Commerce Commission between all points in the continental United States and also involves whether or not adequate motor carrier service will be allowed to continue to be available throughout the entire United States involving as set forth supra some 476 producers and receivers and millions of ultimate consumers.

A complete interpretation of paragraph 203 (b) (6) of Part II of the Interstate Commerce Act, 72 Stat. 573-74 (1958) (49 U.S.C. § 303 (b) (6) 1958), both before and after its amendment by Section 7 (a) of the Transportation Act of 1958 should once and for all be decided after oral

argument and proper presentation of all the facts and law to your Honorable Court. Perhaps the confusion concerning the interpretation of the commodities which are exempt and which are not exempt both prior and after the amendment of Section 7 (a) of the Transportation Act of 1958 can best be summed up in the following quotation in the opinion of Judge Graven of the District Court for the Eastern Division of the Northern District of Iowa in *Interstate Commerce Commission v. Allen E. Kroblin, Inc.*, 113 F. Supp. 599, (E. D. Iowa) *affirmed* 212 F. 2 cd 554 (8th Cir.), *cert. denied*, 348 U.S. 836 (1954). Said Judge Graven at page 601:

> "This particular case is but one engagement of a much larger battle that has been raging for many years. The battle commenced when legislation was proposed granting regulatory powers to the Interstate Commerce Commission as to interstate transportation of motor vehicles and has continued ever since. . . ."

The above facts set forth the interest of Hughes, the Unted States Department of Interior and the public of the United States. Although arguments on the issues involved have been set forth in the pleading heretofore filed by the parties of record nevertheless it is the belief of Hughes that the other parties have not set forth in their pleadings and briefs certain arguments which are controlling; nor called attention to various decision and constitutional positions which are necessary for proper decision of the issues herein. Likewise any decision in this matter may well preclude Hughes from further litigation of his pending proceedings without opportunity to be heard unless a brief amicus curiae be permitted to be filed. The accompanying brief will not duplicate the arguments heretofore filed by the parties of record.

Respectfully submitted,

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No. 95

In the Supreme Court of the United States

OCTOBER TERM, 1961

MILK TRANSPORT, INC., Apellant,

vs.

UNITED STATES of AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

BRIEF AMICUS CURIAE

on behalf of

W. W. HUGHES d/b/a W. W. HUGHES REFRIGERATED SERVICE

TO THE HONORABLE, THE CHIEF JUSTICE AND JUDGES OF THE SUPREME COURT OF THE UNITED STATES:

STATEMENT

The interest of W. W. Hughes d/b/a W. W. Hughes Refrigerated Service has been set forth in the petition for leave to file this brief and will not be repeated here. The question of law involved is set forth in the "Questions Presented by Appeal" on page 3 of the Jurisdictional statement filed by Milk Transport, Inc., appellant. The issue is as follows:

> "(1) Are the 'grandfather' and 'interim' provisions of § 7 (c) of the Transportation Act of 1958, applicable only to applications for certificates to transport the 11 specified commodities in the second proviso of § 7 (a) of the Transportation Act of 1958, as was decided by the lower court, or, are said 'grandfather' and 'interim' provisions applicable to applications for certificates to transport *all* commodities 'made subject to Part II of the Interstate Commerce Act by both

the first and second provisos § 7 (a) of the Act of 1958, including citrus juices?"

ARGUMENT

It is true that the present appeal involves a narrow issue relating to Section 7 (a) and Section 7 (c) of the Transportation Act of 1958, 72 Stat. 573-74 (1958), 49 U.S.C. § 303 (b) (6) (1958). However, the conclusions reached by the three judge statutory court below and the position of the United States of America and the Interstate Commerce Commission are erroneous and unsound and indicate that the issues involved apparently have not been fully understood. In order to properly comprehend the issues involved and to reach a equitable, logical and legal result, the two sections of the Transportation Act of 1958, namely § 7 (a) and 7 (c), must be considered in relation to each other. We will first consider Section 7 (a) of the Transportation Act of 1958 to set forth what was intended to be accomplished thereby. We will then appraise and analyze Section 7 (c) of the Transportation Act of 1958 with the purpose of Section 7 (a) in mind and interpret this section in the plain words set forth therein without attempting to administratively or judicially amend or implement this Section of the Act to reach a strained, illegal, inequitable and illogical result as has the court below, the United States of America and the Interstate Commerce Commission have done.

As is admitted by all parties and has been so adequately set forth in *Interstate Commerce Commission v. Allen E. Kroblin, Inc.*, 113 F. Supp. 599,601 (E. D. Iowa 1953), there has raged for many years a battle within the Interstate Commerce Commission, other agencies of the United States Government and in the federal courts regarding the proper interpretation of the agricultural and fish exemptions which are in issue here.

In an attempt to once and for all resolve the conflicts of interpretation, Congress passed the Transportation Act of 1958. The amendment to Section 203 (b) (6) as contained

in the Transportation Act of 1958 was divided into three sections. Section 7 (a) and Section 7 (c) are the ones here pertinent.

It is agreed by all parties including Hughes that Section 7 (a) intended to provide future economic regulation for all carriers performing transportation of all of the numerous not exempt commodities mentioned and enumerated in the Commodity List of Administrative Ruling No. 107 of the Bureau of Motor Carriers, Interstate Commerce Commission. Also to be regulated is the transportation of exempt commodities when transported in the same vehicle with not exempt commodities. This will be discussed more fully below. Section 7 (a) is clear in this respect. It is also clear beyond argument that the economic regulation of those commodities listed as not exempt in the Commodity List of Administrative Ruling No. 107, was intended to apply to the future only. Congress did not intend nor does a plain reading of the statute infer or prescribe in any way the status of the commodities prior to the effective date of Section 7 (a) of the Transportation Act of 1958. The word "shall" prefixes each and every provisio of Section 7 (a).

Administrative Ruling No. 107 was not an enforciable order of the Interstate Commerce Commission, and was merely advisory and tentative. It was not binding upon the Interstate Commerce Commission itself or outside parties. See *Lesnewsky-Purchase-Rojeske*, 45 M.C.C. 739, 744 (1947); *Teletype, Telegraph and Telephone Service, Oregon and Washington*, 16 M.C.C. 521, 526 (1939). The preface containing the rule itself provides as follows: "The Bureau opinions' in this ruling are tentative and provisional and are made in the absence of authorative Commission or court decisions. . . " Likewise Administrative Ruling No. 110 which proports to interpret Ruling No. 107 states "rulings of this kind are tentative and provisional, and are made in the absence of authorative decisions upon the subject by the Commission". *It is also well to note that Administrative Ruling* No. 107 *of the Bureau of Motor*

Carriers, Interstate Commerce Commission was not an Order of Interstate Commerce Commission, as of the effective date of the *Transportation Act of* 1958. Likewise, the bases for giving the status of exempt or not exempt to the commodities listed therein were in most cases only opinions of Bureau of Motor Carrier or Interstate Commerce Commission decision. Court decisions which are cited as authority for the status of a commodity represent reversals of the interpretations of the Interstate Commerce Commission.

The authority for tentatively prescribing the status of exempt or not exempt of many of the commodities listed in Administrative Ruling numbered 107 of the Bureau of Motor Carriers Interstate Commerce Commission is based on Case 7 with Note 6 explaining. Case 7 is a application of W. W. Hughes pending before the Interstate Commerce Commission. Note 6 which is a part of Administrative Ruling numbered 107 states the proceeding in W. W. Hughes has been reopened and Case 7 cannot be considered as authorative.

It thus appears obvious that the purpose of Section 7 (a) of the Transportation Act of 1958 was merely to proclaim once and for all the future status of the various numerous agricultural and fish commodities contained in Administrative Ruling numbered 107 of the Bureau of Motor Carriers, Interstate Commerce Commission. But Congress did more than just adopt Administrative Ruling numbered 107. Congress specifically named certain commodities which should be exempt or not exempt regardless of how listed in the Commodities List of the Administrative Ruling numbered 107 of the Bureau of Motor Carriers, Interstate Commerce Commission. Congress did not only specifically enumerate the eleven (11) commodities that should be not-exempt regardless of Administrative Ruling numbered 107, but also stated that the rule would not be controlling as to "cooked or uncooked (including breaded) fish or shell fish when frozen or fresh (but not includ-

ing fish or shell fish which had been treated for preserving, such an canned, smoked, pickled, spiced, corned, or kippered products)". Although the court below, the United States Government and the Interstate Commerce Commission somehow believe that the eleven (11) first enumerated commodities are the only ones specially treated, nevertheless the full reading of Section 7 (a) specifically states otherwise and points out the error of judgment and interpretation which has heretofore been given to interpretations of this Section of the Act.

Having determined the motive, reason and proper interpretation of Section 7 (a) of the Transportation Act of 1958, it is well to state that the many carriers wishing to transport the commodities made subject to economic regulation by Section 7 (a) must in the future file an application for a certificate upon proving public convenience and necessity under Section 207 of Part II of the Interstate Commerce Act (49 U.S.C. 307). However those carriers who prior and subsequent to the enactment of Section 7 (a) had been transporting the commodities made subject to the provisions of such section were allowed to continue doing so under the "grandfather" provisions of Section 7 (c) The purpose of Section 7 (c) of the Transportation Act of 1958 is obviously for the purpose of permitting a carrier who in good faith had performed transportation of the commodities made subject to future economic regulation to continue in this business in which he had invested years of his life and money in performing a transportaton service to the producing, distributing and consuming public. Congress in its fairness would not have attempted and did not attempt to legislate carriers out of business who were performing such transportation in good faith prior to and subsequent to the effective date of the Transportation Act of 1958. To interpret Section 7 (c) of the Transportation Act of 1958 otherwise would indeed be unconsitutional and would amount to the taking of property without due process of law. *Monongahela Navigation Co. v. United States*, 148 U.S. 312, (1893); *Harriman v. Inter-*

Commerce Commission, 211 U.S. 407, 422, (1908).

Prudential Insurance Co. v. Benjamin, 328 U.S. 408, is cited by the United States of America and the Interstate Commerce Commission for authority that there is no necessity for Congress to confer "grandfather" rights. A review of this case reveals no applicability whatsoever for the statement of law for which it was cited.

Section 7 (c) of the Transportation Act of 1958 provides that any carrier who was in bona fide operation "on May 1, 1958 in the transportation of property. . . made subject to the provisions of Part II of that Act by paragraph (a) of this section, . . and has so operated since that time. . . " be issued a certificate to continue such operations. The phase "Part II of that Act" refers to Part II of the Interstate Commerce Act (49 U.S.C.A. § 301-28). This phrase "paragraph (a) of this section" refers to Section 7 (a) of the Transportation Act of 1958 which amended Section 203 (b) (6) of Part II of the Interstate Commerce Act, the agricultural and fish commodity exemption clause of the Federal Motor Carrier Act.

It thus becomes important to interpret Section 7 (c) of the Transportation Act of 1958 according to the plain unambiguous words set forth therein.

The court below adopted the position of the United States Government and the Interstate Commerce Commission that "grandfather" authority is only authorized for eleven (11) of the (17) enumerated commodities listed specifically in the second proviso of Section 7 (a) of the Transportation Act of 1958. This is the cardinal error for they have ignored the plain language of the Act. No justification exists for their interpretation. In order to reach such a conclusion Section 7 (c) of the Transportation Act of 1958 would have to be jurisdictionally, administratively or now by argument of the parties rewritten in the following respects:

(a) The phrase in Section 7 (c) reading "... in the transportation of property. . ." would have to be re-

written to read ". . . in the transportation of *formerly exempt* property. . .". There is no justification for prefixing the words formerly exempt in the description of the property for which "grandfather" rights are plainly authorized. Section 7 (c) of the Transportation Act of 1958 clearly provides for "grandfather" rights for all property subject to the provisions of Section 7 (a), namely all property enumerated in the Commodity List of Administrative Ruling numbered 107 of the Bureau of Motor Carriers, Interstate Commerce Commission, whether therein designated exempt or not exempt and as modified in the second proviso. A certificate is required to transport *exempt* property as well as not exempt property if the exempt property is transported in the same vehicle with not exempt property. Section 203 (b) (6) of Part II of the Interstate Commerce Act specifically provides both prior to and after the Transportation Act of 1958 that exempt property may only be transported without a certificate ". . . if such motor vehicles are not used in carrying any other property. . . for compensation. . . ".

(b) The court below, would have the Act interpreted and rewritten so as not to grant "grandfather" authority for all property subject to the provisions of Section 7 (a) of the Transportation Act of 1958 but to only those commodities "*returned to regulation*" by the second proviso of Section 7 (a) of the Transportation Act of 1958. Nowhere in the Act can it be inferred that there was every intended nor are there any words that can be interperted to mean that "grandfather" rights would be granted for only those commodities 'returned to regulation". These commodities were not "returned to regulation". They never were under lawful regulation by the Interstate Commerce Commission as it has judicially been de-

cided they were always exempt. *Home Transfer & Storage Co. v. United States*, 141 F. Supp. 599 (W. D. Wash.) *aff'd.* 352 U.S. 884 (1956); *Frozen Food Express v. United States*, 148 F. Supp. 399, (S. D. Texas, 1956) *aff'd per curiam* 355 U.S. 6 (1957); *Interstate Commerce Commission v. Wagner*, 112 F. Supp. 109 (M. D. Tenn. 1953). The second proviso of Section 7 (a) of the Transportation Act of 1958 specifically enumerates and brings under regulation not only the eleven (11) enumerated commodities referred to above but also fish and shell fish which have been treated for prserving, such as canned, smoked, pickled, spiced, corned, or kippered products. It is contended by the Interstate Commerce Commission and the Department of Justice that these commodities although not exempt would not be subject to "grandfather" rights. This in spite of the fact that such commodities were in fact exempt prior to enactment of the Transportation Act of 1958.

(c) The court below, the United States Government and the Interstate Commerce Commission have erred and would in reaching their conclusions and presenting their argument rewrite the provisions of Section 7 (c) of the Transportation Act of 1958 in that they ignore the plain language of Section 7 (c) which provides that all property whether exempt or not exempt is subject to the granting of "grandfather" authority if such property is subject to the (entire) provision of Section 7 (a) of the Transportation Act of 1958. The court below, the United States Government and the Interstate Commerce Commission would rewrite the Act by providing that "grandfather" authority should only be granted to those eleven (11) commodities of the 17 made subject to the second proviso of Section 7 (a) of the Transportation Act of 1958, the amendment to

Section 203 (b) (6) of Part II of the Interstate Comerce Act. Nowhere are there any words nor is there any evidence that it was ever intended that only "grandfather" authority should be granted for those eleven (11) commodities of the 17 listed in the second proviso of Section 7 (a) of the Transportation Act of 1958. Section 7 (c) is clear in that it provides "grandfather" rights for property (whether previously exempt or not exempt) made subject to the "provisions of Part II of that Act by paragraph (a) of this section". (This section being the entire provisions of 7 (a) of the Transportation Act of 1958.) Since the status of the commodities shown in the Commodity List of Administrative Ruling numbered 107 of the Bureau of Motor Carriers, Interstate Commerce Commission, had never been definitely established, except in the few court decisions, the very purpose of Section 7 (a) of the Transportation Act of 1958 was to make all of the listed commodities subject to its provisions. This was done primarily by the first proviso not the second proviso. The second provision merely made some specific deviations from all the numerous other commodities made subject to the first proviso.

Thus it appears that the court below, could only possibly sustain their position by the rewriting of Section 7 (c) of the Transportation Act of 1958 as shown above. Likewise as shown above, the Court below, failed to properly approach the problem, namely in interpreting the Transportation Act of 1958 they have ignored first in determining the purpose of Section 7 (a) of the Transportation Act of 1958 as it was intended and then secondly in interpreting Section 7 (c) not only as it was intended but by ignoring the clear and unambiguous language of Section 7 (c) as contained therein.

In order to portray and present to your Honorable Court the actual effect that adoption of the interpretation of the

court below, it might be well to rewrite Section 7 (c) of the Transportation Act of 1958 as they would have it done. The words in italics are the words that would have to be added to Section 7(c) of the Transportation Act of 1958 if the position of the lower court, the United States Government and the Interstate Commerce Commission were to be sustained as they would interpret and rewrite Section 7 (c) of the Transportation Act of 1958. Insofar as such section is pertinent it would then read as follows:

STATUTE AS IT WOULD HAVE TO BE REWRITTEN

". . . if any person. . . was in bona fide operation. . . in the transportation of *formerly exempt* property *returned to regulation* for compensation by motor vehicle made subject to the provisions of Part II of that Act by *the second proviso* of paragraph (a) of this section. . .".

Noted below are two brief comments on other issues inserted in the Motion to Affirm.

The United States Government and the Interstate Commerce Commission in their brief in support of the motion to affirm state as follows at page 7:

> "The flaw in this argument is that the first proviso, unlike the second, does not purport to subject any type of previously exempt transportation to Commission regulation. It merely continues the status as exempt or non-exempt of various commodities previously classified by the Commission on the basis of then controlling interpretations of the Act. (footnote omitted)"

Actually this statement is incorrect and not in accordance with the plain language of Section 7 (a) of the Transportation Act of 1958.

At page 9 of the brief *Inland Motor Freight* "*Grand-*

father" Application, 83 M.C.C. 543 (1960) is cited. Reference to this case clearly establishes that even the Interstate Commerce Commission has decided that carriers are entitled to "grandfather" rights which are not specifically listed or enumerated in the second proviso of Section 7 (a) of the Transportation Act of 1958. The language recited in the Interstate Commerce Commission decision states that only "grandfather" authority may be granted for the commodities enumerated in the second proviso. However, the logic set forth in the decision is faulty and not substantiated by reason or the plain words of the statute. In that case, "grandfather" authority was granted to transport fresh fruit when transported in the same vehicle with any of the eleven (11) specifically listed and enumerated commodities. However reference to the commodities listed in the second proviso of Section 7 (a) of the Transportation Act of 1958 reveals that there is not listed specifically or by inference "fresh fruits". The only interpretation of the statute that would permit "grandfather" authority under the reasoning of the Interstate Commerce Commission for "fresh fruits" would be that the same are made subject to the first proviso of Section 7 (a) of the Transportation Act of 1958. Hughes agrees that "grandfather" rights are authorized where exempt commodities are co-mingled with such commodities as are now not exempt. But in order to obtain and be entitled to such "grandfather" authority these exempt commodities must be subject to the provisions of the first proviso of Section 7 (a) of the Transportation Act of 1958 since these commodities are not specifically enumerated in the second proviso of Section 7 (a) of the Transportation Act of 1958. The illogical reasoning of the Interstate Commerce Commission in the decision cited above substantiates the position taken here. Likewise it might be well to quote from said decision wherein it was stated at Page 545:

"The purpose of the enactment by Congress of the

portions of the Transportation Act of 1958 here pertinent clearly is to secure to existing carriers their right to operating authority coextensive with their prior lawful operations,. . ."

Perhaps another one of the issues injected into the proceeding by the United States Government and the Interstate Commerce Commission need be commented on. In a very brief statement it is contended that the legislative history of the Transportation Act of 1958 removes any doubt as to what commodities are subject to "grandfather" authority. No statement could be further from the truth. The legislative history of the Transportation Act of 1958 involves numerous and lengthy debates by members of both the United States Senate and the United States House of Representatives as well as various Committee reports of Congress. The United States Government and the Interstate Commerce Commission in their brief have seen fit to quote only some twenty lines from a report originating in the House of Representatives. These twenty lines are taken out of the context insofar as the entire report is concerned and obviously could not possibly show the intent if any is shown of the Senate or even of the final bill as it was presented to both the House and Senate for passage.

The Congressional Record prior to the passage of the Transportation Act of 1958 has been carefully reviewed. Various phrases taken out of context could possibly be used favorably by any of the parties to this appeal. However little or no help can possibly be gained from the congressional history due to the various conflicts of interest of those presenting their views. That portion of the House Report contained in the twenty lines in the brief of the United States Government and the Interstate Commerce Commission even on its face could be used to support the view that it was intended that economic regulation be provided for those carriers who wish to transport in the future frozen fruits, frozen

berries, frozen vegetables, coffee, tea cocoa, hemp, imported wool and certain categories of domestic wool. These twenty lines do not purport to show that other commodities were not likewise to be made subject to economic regulaion. As a matter of fact the second proviso of Sction 7 (a) of the Transportation Act of 1958 does not only specifically enumerate these eleven (11) commodities but also some six (6) other commodities which were made subject to economic regulation. A complete reading of the Congrssional Record if it were appropriate would substantiate the position taken in this brief, namely that all commodities listed in Administrative Ruling No. 107, were intended to be made subject to the first proviso of Section 7 (a) of the Transportation Act of 1958. Exempt commodities were to be made subject to economic regulation if co-mingled and transported in the same vehicle as those specifically designated not exempt

In any event whereas here th plain language of Section 7 (a) and Section 7 (c) of the Transportation Act of 1958 is unambiguous and of definite and positive interpretation, the legislative history becomes unimportant and should not be considered in determining the effect of the statute upon those coming under its provisions.

In 2 Sutherland, Statutory Construction, § 5005, (3rd Ed. 1943) it was stated as follows:

"However, the committee report cannot be taken as giving to the statute a meaning not fairly within its words." 3

3. "United States v. Burden Smith & Co., 33 F. (2d) 229 (CCA 5th, 1929); Banco Mexicano de Commercio E. Industria v. Deutsche Bank, 289 Fed. 924, 53 App. D. C. 266 (1923); see St. Louis, I. M. & S. Ry. v. Craft, 237 U.S. 648, 661, (1915); Hoover v. Intercity Radio Co., 286 Fed. 1003, 1006, 52 App. D. C. 339 (1923).

"Where the terms of a statute are clear and unambiguous, the legislative intent must be derived therefrom, not withstanding the intent expressed therein conflicts with the pur-

pose of the statute as set forth in committee reports of Congress. Caminetti v. United States, 242 U. S. 470, 490, 61 L. Ed. 442, 37 Sup. Ct. 192 (1917); United States v. Shreveport Grain & Elevator Co., 287 U. S. 77, 83, 77 L. Ed. 175, 53 Sup. Ct. 42 (1932); Helvering v. City Bank Farmers Trust Co., 296 U.S. 85, 89, 80 L. Ed. 62, 56 Sup. Ct. 70 (1935)."

Finally, in showing the inconsistency of the arguments of the United States Government and the Interstate Commerce Commission and in proving that the intent of Congress was not to limit "grandfather" authority to the eleven (11) enumerated commodities a brief analysis of Section 7 (b) of the Transportation Act of 1958 must be included. Section 7 (b) of Transportation Act of 1958, 72 Stat. 574, 49 U.S.C. § 303 (b) (6), provides as follows:

> "Unless otherwise specifically indicated therein, the holder of any certificate or permit heretofore issued by the Interstate Commerce Commission, or hereafter so issued pursuant to an application filed on or before the date on which this section takes effect, authorizing the holder thereof to engage as a common or contract carrier by motor vehicle in the transportation in interstate or foreign commerce of property made subject to the provisions of part II of the Interstate Commerce Act by paragraph (footnote omitted) (a) of this section, over any route or routes or within any territory, may without making application under that Act engage, to the same extent and subject to the same terms, conditions and limitations, as a common or contract carrier by motor vehicle, as the case may be, in, the, transportation of such property, over such route or routes or within such territory, in interstate or foreign commerce."

This Section of the Transportation Act of 1958 amending Section 203 (b) (6) of the Interstate Commerce Act in effect grants (retroactive and or "grandfather) authority to any carrier holding a certificate prior to the effective date of the Transportation Act of 1958 for all commodities subject to Section (7) (a) of the Transportation Act of 1958. Certainly Congress did not intend to favor a certificated carrier over other carriers who had previously not been subject to economic regulation and, of course, it was intended that each would receive authority to perform operations of those commodities subject to Section 7 (a) of the Transportation Act of 1958. A certificated carrier, such as a carrier holding general commodity authority, would not have included in his certificate the right to perform transportation of formerly exempt commodities as no authority was ever issued for commodities not subject to economic regulation. However, Congress provided in Section 7 (b) of the Transportation Act of 1958 that such a carrier would be permitted to continue or even commence new operations in the transportation of all commodities subject to the provisions of Section 7 (a) of the Transportation Act of 1958 whether or not such commodities were exempt or not exempt prior to the enactment of the amendment and whether or not an administrative or judicial order had been issued proclaiming the status of the individual commodities.

It is interesting to note that under Secion 7 (b) of the Transportation Act of 1958 a carrier authorized to perform the transportation of general commodities would be granted authority automatically to perform transportation of all commodities subject to the entire provisions of Section 7 (a) of the Transportation Act of 1958, and this would be true without the folowing enumerated procedures:

(a) It would not be necessary to file an ap-

plication with the Interstate Commerce Commission.

(b) It would not be necessary to notify other motor carriers or the utility commissions of the various states in which operations would be conducted.

(c) It would not be necessary to prove that transportation of such commodities had ever been transported either prior to or after the effective date of the Transportation Act of 1958.

(d) It would not be necessary to publish notice in the Federal Register as required of all other carriers including those claiming "grandfather" rights under Section 7 (c) of the Transportation Act of 1958.

(e) It would not be necessary to apparently even file a tariff describing the rates for such transportation.

Certainly Congress intended at least equal protection for those carriers subject to Section 7 (c) of the Transportation Act of 1958 and to have prescribed otherwise would be unfair and in fact violate the constitutional rights of such carriers subject only to Section 7 (c) of the Transportation Act of 1958. No such discrimination could possibly be intended.

Section 7 (c) of the Transportation Act of 1958 does provide that an application must be filed. (Such application was timely filed by Milk Transport, Inc.) However, Section 7 (c) of the Transportation Act of 1958 prescribes that a certificate shall issue "without further proceedings". In the present proceeding Milk Transport, Inc. was not even permitted to proceed under its duly filed application even though the statute specifically provides that no proceeding was required. If under Section 7 (b) of the Transportation Act of 1958, any carrier may commence or continue to perform transportation of the commodities subject to the provisions of Section 7 (a) even though such transportation had never

been conducted in the past then all of the more so the arbitrariness and inconsistency of the Interstate Commerce Commission is revealed by its requirement of further proceedings but to deny the right to perform operation by summarily rejecting an application duly and timely filed.

SUMMARY

The lower court, and the Appelees under their interpretation and argument were and are in error for the following reasons as more fully set forth above, but as summarized below.

(a) There is no justification for limiting "grandfather" authority to the property *formerly exempt* as Section 7 (c) of the Transportation Act of 1958 is not so written. Further the exempt or not exempt status of the commodities listed in the Commodity List of of Administrative Ruling numbered 107 of the Bureau of Motor Carriers, Interstate Commerce Commission, had never been legally established prior to enactment of the Transportation Act of 1958.

(b) There is no justification for limiting "grandfather" authority to those commodities *returned to regulation*. As shown above the eleven (11) enumerated commodities set forth in the second proviso of Section 7 (a) of the Transportation Act of 1958, were *not returned* to regulation by the Transportation Act of 1958. They never were lawfully subject to economic regulation. (see Cases cited supra in paragraph (b).

(c) There is no justification for limiting the "grandfather" authority to those eleven (11) commodities of those specified in the second proviso of Section 7 (a) of the Transportation Act of 1958 as the language contained in Section 7 (c) of the Transportation Act of 1958 is clear and not ambiguous and the primary purpose of the enactment of the first

proviso of Section 7 (a) of the Transportation Act of 1958 was to subject all the commodities shown in the Commodity List of Administrative Ruling numbered 107 of the Bureau of Motor Carriers, Interstate Commerce Commission to its provisions.

(d) Finally, there is no justification for interpreting Section 7 (a) of the Transportation Act of 1958 so as to apply and determine the status prior to the enactment of the Act as to whether the individual commodities were exempt or not exempt. The plain word "shall" which applies to the future only proceeds both the first proviso and the second proviso of Section 7 (a) of the Transportation Act of 1958.

CONCLUSIONS

By this brief Amicus Curiae there have been set forth the provisions of the Transportation Act of 1958 applicable to the issues involved on appeal and the issues should be resolved in favor of apellant by the noting of probable jurisdiction in that lower court erred in concluding and deciding as a matter of the law that no carrier, including appellant, Milk Transport, Inc., is entitled to any "grandfather" authority under Section 7 (a) and Section 7 (c) of the Transportation Act of 1958 except for eleven (11) commodities of those specifically named and listed in the second proviso of Section 7 (a) of the

Transportation Act of 1958.

Respectfully submitted,

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September 1, 1961

CERTIFICATE OF SERVICE

I, Harold S. Shertz, one of the attorneys for petitioner, and a member of the bar of the Supreme Court of the United States, hereby certify that, on the first day of September, 1961 I served copies of the foregoing documents on the several parties hereto, as follows:

1. On the United States, by mailing copies thereof, in duly addressed envelopes, with mailing postage prepaid to Solicitor General, Dept. of Justice, Washington 25, D.C., Robert A. Biggs, Ass. Attorney General, and John H. D. Wiggers, Attorney, and by mailing thereof, in duly addressed envelope, postage prepaid to Miles Lord, U.S. Attorney, Federal Courts Bldg., St. Paul, Minnesota.

2. On the Interstate Commerce Commission by mailing copies thereof, in duly addressed envelopes with postage prepaid, to Robert W. Ginnane, General Council, and Fritz Kahn, Attorney, Interstate Commerce Commission, Washington 25, D. C.

3. On the Intervenors, by mailing a copy threof, in duly addressed envelopes with postage prepaid to Frank B. Hand Jr., Esq. and Daniel B. Johnson, Esq., Transportation Bldg., Washington 6, D.C.

4. On appellant, by mailing a copy thereof, in duly addressed envelope with postage prepaid to Donald A. Morken, Esq., 1000 1st National Bank, Bldg., Minneapolis, Minnesota.

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